this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, you still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal preemption, I'm not sure I understand its relation to the easement.

. . .

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

. . .

JUSTICE BORDEN: But I don't understand how – I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are preempted, so even if this had happened in the 14th year instead of the

– well the 16th year[3] so you didn't have an easement by prescription – your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption – *the whole point of pre-emption is if I have the right to remove the trees.*

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport *when it has the property right to do so.*

I do not claim –

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's findings of the prescriptive easement?

MR. BASHAW: Certainly, yeah, *it doesn't give me the right. If there's no prescriptive easement, Your Honor –*

. . .

[3] Prescriptive easements arise under Connecticut law after 15 years of uninterrupted use as of right. (Pet. App. 86a.)

JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. *Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it.* The DOT can come out and say those trees are a problem, I don't have the right to, *but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.*

If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption,

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you – well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

(Resp. App., 24-30) (emphasis added).

In its decision, the Connecticut Supreme Court first affirmed the trial court's decision concerning the existence

and limited scope of the prescriptive easement. (Pet. App., 17a-27a.) Then, in clear reliance on the petitioners' explicit disavowal of their preemption claim, the Court held:

> The airport defendants appear to argue in their brief that, because the federal government has exclusive jurisdiction over navigable airspace, they could remove obstructions within the navigable airspace without regard to either state property law or state and local land use regulations. At oral argument before this court, however, they clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right. See *Westchester v. Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990). . . .

(Pet. App., 11a). The Court then explained that it would not address the petitioners' preemption claim because

> [i]f the [petitioners] had no cause of action against the land trust defendants to require them to clear-cut the land under federal law; see *Westchester v. Greenwich*, supra, 745 F. Supp. at 955; they had no right under federal law to conduct such an activity themselves. Accordingly, we conclude that, *under the [petitioners'] own reasoning*, they had no right under federal law to clear-cut the trees in the absence of a right to do so under state property law. In light of the trial court's unchallenged determination that the [petitioners] had no such property right, we conclude that *we need not address their claim that, if*

> *they had such a right, federal law would preempt the application of local land use law.* We conclude, therefore, that in the absence of any right under state property law to clear-cut the trees, state and local laws regulating activity within wetlands and watercourses applied to the [petitioners'] conduct.

(Pet. App., 26a-27a) (emphasis added).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE CONNECTICUT SUPREME COURT DID NOT ADDRESS THE MERITS OF THE PETITIONERS' PREEMPTION CLAIM AS A DIRECT CONSEQUENCE OF THE PETITIONERS' AFFIRMATIVE WAIVER OF THE FACTUAL AND LEGAL BASIS FOR THAT CLAIM AT ORAL ARGUMENT.

Tucked away in a single footnote of the certiorari petition is a dramatically understated, but ultimately fatal, admission: "In the court below, petitioners conceded that to some extent they exceeded the scope of their prescriptive easement under state law to cut trees on the Land Trust and Conservancy properties." (Pet., 12 n.4). In fact, the petitioners' clear and repeated concession at oral argument in the Connecticut Supreme Court, set forth verbatim in the Statement of the Case, constitutes an affirmative waiver of the basis for their preemption claim. As the Connecticut Supreme Court properly concluded, the petitioners' concession that federal law did not give them any legal right to enter the land trust defendants' property in order to trim or cut trees made it unnecessary to consider

whether, if the petitioners had such a right, federal aviation law would preempt local and state land use provisions. (Pet. App., 26a-27a). The Connecticut Supreme Court's decision not to address the preemption question – which was a direct consequence of the petitioners' own repeated concession – makes this an inappropriate case for certiorari.

Section 1257(a) of the Judicial Code, which defines and limits the jurisdiction of this Court over state court proceedings, provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257(a). In keeping with the limited scope of such review, this Court "[w]ith very rare exceptions . . . [has] adhered to the rule . . . that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (internal citation omitted). If both of those elements are lacking, then this Court's "appellate jurisdiction fails." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (quoting *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 391 (1836)).

Furthermore, "[w]hen the highest state court is silent on a federal question before us, *we assume that the issue was not properly presented* . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court *had a fair opportunity to address the federal question that is sought to be presented here*. . . ." *Adams*, 520 U.S. at 86-87 (emphasis added; internal citations omitted). The assumption that silence by a highest state court establishes a failure to properly present a federal claim forms a core part of this Court's jurisdictional jurisprudence. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Webb v. Webb*, 451 U.S. 493, 501 (1981); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (all refusing to review federal issues where highest state court was silent and issue was not properly presented); see also *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988) ("[i]t is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below").

A petitioner therefore must demonstrate two things in order to overcome the presumption that silence by a highest state court establishes a failure to present a federal claim properly. First, a petitioner must prove compliance with all applicable state procedural rules. See *Bankers Life*, 486 U.S. at 77-78; *Webb*, 451 U.S. at 501. Second, a petitioner must "demonstrate that it presented the particular claim at issue here with 'fair precision and in due time'. . . ." *Adams*, 520 U.S. at 87 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). The former concerns technical compliance with state procedural

requirements, while the latter appears to involve an inquiry into the substantive manner in which a petitioner's federal claim was raised (or waived). *Adams*, 520 U.S. at 87-88. Under both tests,

> at the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb, 451 U.S. at 501 (emphasis in original).

Although this Court has never directly addressed the affirmative waiver of the basis for a federal claim at oral argument before a state's highest court, this Court held that a similar waiver at oral argument before it barred consideration of an appellant's claim in *DeBacker v. Brainard*, 396 U.S. 28 (1969). In *DeBacker*, the appellant asked this Court "to decide whether the preponderance-of-the-evidence standard for burden of proof in juvenile court proceedings . . . satisfies the Due Process Clause of the Fourteenth Amendment." *Id.* at 31. However, at oral argument before this Court, appellant's counsel admitted that "[t]he evidence [was] more than sufficient to sustain a conviction[,]" and that "*[n]o matter what the standard was* . . . our evidence just isn't insufficient." *Id.* (ellipses in original; emphasis added). On the basis of this "commendably forthright explanation by appellant's counsel,"

this Court held that the appellant's federal claim was not appropriate for review. *Id.*

Other circumstances in which this Court has held that a federal claim was not properly presented are likewise instructive. In *Adams*, for example, the petitioners asked this Court to review whether the certification and settlement of a state class action lawsuit violated due process. *Adams*, 520 U.S. at 85. However, not only did the petitioners barely mention the issue in their main brief to the Alabama Supreme Court, they did not discuss it at all in their reply brief, in spite of the fact that the *respondents* addressed the issue in their brief. *Id.* at 88-89. Given those circumstances, this Court held that "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Id.* at 89; see also *Rotary Int'l*, 481 U.S. at 550 n.9 (a "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction"); *Beck v. Washington*, 369 U.S. 541, 553 (1962) (merely setting forth one sentence discussing federal claim in lengthy brief insufficient).

As in *DeBacker*, the petitioners here seek certification for a legal issue the essential premise of which was waived in oral argument – and an issue which the Connecticut Supreme Court expressly refused to decide because of that waiver. Indeed, this is not a case in which an inference must be drawn as to the reason for the silence of a highest state court on the claimed federal question. To the contrary, the reason for that silence is patently clear: the petitioners' own statements at oral argument. As such, the Connecticut Supreme Court simply did not have "a fair

opportunity to address the federal question that is sought to be presented here. . . ." *Adams*, 520 U.S. at 87.

The Question Presented by the petitioners concerns the extent to which state and local land use rules concerning United States airspace are preempted. The essential premise for this question, as framed by the petitioners at oral argument, is the extent to which state property law also is preempted. Since the state property right the petitioners were found to have had did not permit them to clear cut the 2.5 acres of the neighbor's property, the Question Presented is properly before this Court only if the petitioners argued to the Connecticut Supreme Court that the neighbor's property right not to be clear cut also is preempted. Put another way, whether state and local land use regulations are preempted is of no legal significance now because the petitioners repeatedly told the Connecticut Supreme Court that they had no right to do what they did even if the regulations were preempted and, on that basis, the Court declined to consider the petitioners' federal claim.

It is for this reason that the respondents, in their Concise Statement of the Case, have dwelt on the oral argument before the Connecticut Supreme Court. It may seem odd that Attorney Bashaw on the one hand conceded that his clients had to have a state law right to clear-cut the neighbors' trees in order to make a preemption claim, and on the other hand did not challenge the trial court's finding that his clients had no such right to clear-cut the trees. But the former is just what he did do and the latter is just what he did not do and the result was that the Connecticut Supreme Court did not consider or decide the preemption question.

The waiver by Attorney Bashaw could not be more explicit. It was not one hasty or ambiguous response to one judicial question. The colloquy with Justice Borden went on for several minutes and seven pages of printed transcript. Justice Borden's questions were clear as a bell and he pressed Attorney Bashaw to make sure that he (Justice Borden) was not misunderstanding what he was hearing. Attorney Bashaw's responses were also clear as a bell. To take the most obvious examples:

> MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this [preemption] gives you the right to go onto somebody else's property, to go and cut down and remove their trees.
>
> . . .
>
> I'm not making a claim that the [federal] regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.
>
> . . .
>
> JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?
>
> MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor –
>
> . . .

> JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.
>
> MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go on somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

(Resp. App., 24-30).

This last remark was clear enough that, when Attorney Bashaw had finished his answer, Justice Borden responded, "Well, I understand your argument." This understanding naturally convinced the Connecticut Supreme Court not to consider the petitioners' federal preemption claim. Indeed, the Court even cited *Westchester v. Greenwich*, the one case Attorney Bashaw referred to during the colloquy. Just as if the petitioners had affirmatively disclaimed the basis for their preemption argument in their briefs to the Connecticut Supreme Court, this explicit waiver at oral argument demonstrates that the petitioners did not present "the particular claim at issue here with 'fair precision and in due time'. . . ." *Adams*, 520 U.S. at 87. As a consequence of this concession, the factual and legal basis for the petitioners' federal claim falls and the petition falls with it.[4]

---

[4] The petitioners make no attempt to ameliorate the fatal nature of this concession, and thereby satisfy *their* burden to establish jurisdiction under §1257(a), except to assert that all they conceded at oral

(Continued on following page)

II. THE RECORD IN THIS CASE DOES NOT PROVIDE A SOUND BASIS TO REVIEW THE PETITIONERS' PREEMPTION AND PUBLIC POLICY ARGUMENTS BECAUSE MANY OF THE FACTUAL AND REGULATORY ASSERTIONS IN THEIR PETITION ARE MISLEADING OR UNTRUE.

Not only did the petitioners affirmatively waive the basis for their preemption claim, but a number of the key factual and regulatory assertions in their petition are misleading or simply untrue. These significant gaps in the record also make this case inappropriate for certiorari.

As a factual matter, the petitioners attempt to cloak their conduct in FAA authority by suggesting that their clear-cutting activities were simply part of a continuing effort to comply with supposed federal regulation. To support this, the petitioners point to the results of a 1999 inspection by the Connecticut Department of Transportation, which required them to remove a line of trees *on airport property* that were "obstructions to air navigation". (Pet., 7). While that inspection did occur, and the trees were removed, it has absolutely nothing to do with the petitioners' claim that they were somehow required by federal law to clear-cut 2.5 acres of trees on property that they did not own.[5]

---

argument was that the Land Trust and Conservancy were entitled to damages for trespass. Even a cursory reading of the oral argument transcript belies this assertion. Attorney Bashaw stated, on at least three separate occasions, that federal law preempted state wetlands law only *if* the petitioners had the property right to remove the trees, and that federal law did not give them any such right. (Resp. App., 24-30).

[5] The letter to Mellon from the inspector, Warren Stannard, which was an exhibit at trial and in the Appendix to the respondents' brief in

(Continued on following page)

First, the inspector advised the petitioners that, upon inspection, several "items were noted that need attention to keep the airport in compliance with *State* regulations." (Resp. App., 90) (emphasis added). While the inspector also referenced FAA regulations, his concern with State standards undermines the petitioners' all-encompassing depiction of federal regulation in this area.

More significantly, the inspection dealt exclusively with conditions on *the petitioners' property*. The inspector made no observations or assessment of any property beyond the borders of the airport and certainly made no recommendations concerning "obstructions to air navigation" which may have existed on the property of adjacent landowners. (Resp. App., 90-93). Since this inspection took place only one year before the petitioners took it upon themselves to wipe out 2.5 acres of woodland that they did not own, it is obvious that any "obstruction" that existed at the time of the petitioners' clear-cutting must have existed at the time of the inspection. Nevertheless, the inspector, charged with protecting the navigable air space, took no note of any such obstructions and *did not* require the petitioners to take any steps with respect to potential obstructions on the land of others.[6]

---

the Connecticut Supreme Court, is reproduced in the Appendix to this opposition at pages 90-93.

[6] Indeed, at trial the inspector clearly confirmed this point:

> MR. BRANSE: And in your capacity as the [FAA] inspector preparing these [5010 airport inspection] reports, did you authorize activity on land not owned by the airport owner?
>
> MR. STANNARD: No, sir.

(Trial Tr., 3/9/04, 93).

It is also important to note that, with respect to the trees on the petitioners' property that the inspector was concerned about, he addressed only those obstructions that interfered with the theoretical "runway approach surface" described in Part 77 of the federal regulations. The "runway protection zone," which forms so crucial a part of the petitioners' argument, is never mentioned. Thus, despite the petitioners' claims to the contrary, the official charged with enforcing the federal regulations on which the petitioners rely did not believe that clear-cutting 2.5 acres on the Land Trust and Conservancy properties was "called for" under federal regulation.

The petitioners also claim, as if it were established fact, that "[b]y late 2000, trees on the Land Trust and Conservancy properties continued to threaten the safety of takeoffs and landings at the Airport." (Pet., 8). First, as described above, the DOT inspector never said that trees on those properties *ever* threatened the safety of takeoffs and landings, so it is wrong to suggest that they *continued* to do so. Moreover, the petitioners cite only to the decision of the Connecticut Supreme Court to support their claim of threatened safety. (Pet., 8, citing Pet. App., 4a). However, the Connecticut Supreme Court's decision is crystal clear that the alleged threat to safety was merely the petitioners' *claim* in the trial court and not an established fact. If this case truly warranted certiorari, the petitioners would not need to resort to such deceptive tactics regarding the record.

The same distortions exist with respect to the principal regulatory argument made by the petitioners. The central pillar of that argument, repeated at numerous points in their petition, is the claim that federal regulations "call for" the removal of obstructions in a "runway

protection zone". (Pet., 2, 5, 15, 16-18, 23, 29). The petitioners base this claim on FAA Advisory Circular No. 150/5300-13, §§211 and 212, but they are simply wrong to suggest the existence of some federal *requirement* that runway protection zones be cleared. The FAA Advisory the petitioners cite, when read in context, makes it quite clear that there is no such requirement.

First, FAA Advisory Circular No. 150/5300-13, §201a(2)(b), states that runway protection zones "should be on airport property." The area in question in this case is not on airport property. Sections 212a(1)(a) and (b) specifically differentiate between a runway "object free area" and adjacent areas that are subject only to unspecified "controlled activity." Section 212a(2)(a), on which the petitioners specifically rely to suggest that the FAA "specifically forbids forestry activities" in a runway protection zone, (Pet., 5), states that both golf courses and automobile parking are acceptable. Since golf courses usually have trees on them, and since an emergency landing could not be made atop parked cars, the petitioners' argument that the runway protection zone is required by FAA "regulation" to be free of trees in order to facilitate emergency landings is substantially undermined by this portion of the Advisory (which the petitioners fail even to acknowledge).

Most egregiously, the petitioners ignore section 212b, which states in full that:

> Where it is determined to be impracticable for the airport owner to acquire and plan the land uses within the entire RPZ, the RPZ land use standards have *recommendation status* for that portion of the RPZ not controlled by the airport owner.

(Emphasis added).

In other words, with respect to runway protection zones on land not owned by the airport, the FAA *requires* nothing. The FAA merely suggests and recommends; the petitioners' implication that it requires anything is misleading and wrong. Ultimately, the petitioners cannot contend that federal preemption should be based upon a non-binding federal recommendation (whether they characterize it properly or not). That simply is not the law, and the petitioners admitted as much before the Connecticut Supreme Court:

> JUSTICE ZARELLA: Could the FAA, through the DOT, order you to cut that [a 200-foot tall tree in the approach slope area] down?
>
> MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.
>
> In fact, what Your Honor is actually getting to is a point . . . that these Part 77 regulations are advisory, they're not enforceable.

(Resp. App., 20).

Finally, the petitioners' claim of a conflict with decisions of the Ninth and Second Circuits is unadulterated fiction. First, it is telling that the petitioners claim a conflict, not between decisions of the Ninth and Second Circuits and the decision of the Connecticut Supreme Court, but between decisions of the Ninth and Second Circuits and "the decisions below". (Pet., 19). This phrase is merely a euphemism for the decision of the trial court, which, due to the petitioners' concession, is the only court that actually addressed the preemption question. It is, of course, necessary for the petitioners to engage in this sort

of linguistic legerdemain, given that the Connecticut Supreme Court expressly declined to decide the issue on which the petitioners allege a conflict. However, the petitioners' disingenuous description does not constitute the type of conflict envisaged by Rule 10(b) – i.e., in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. . . ." SUP. CT. R. 10(b). A conflict with the decision of a trial court does not come close to meeting that standard.

Second, the issues in this case are entirely distinct from the issues in the cases cited by the petitioners. Both of those cases, *United States v. City of New Haven*, 496 F.2d 452 (2nd Cir.), *cert. denied sub nom. Town of East Haven v. United States*, 419 U.S. 958 (1974), and *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), concerned property *owned by the airport* and the right of a municipality to exercise control over the airport's use of *its own property*. Neither case dealt with the issue here – i.e., what the owner of an airport may legally do on the property of *others*.[7] Because they involved an entirely different question, the

[7] Petitioners are wrong to suggest that the decision in *City of New Haven* had anything to do with "buying property." (Pet., 20). The court in that case addressed only the question of East Haven's authority to control property already owned by New Haven, the owner of the airport. In affirming the trial court's decision, the Second Circuit noted that the lower court "did not rule on the legality of New Haven's acquisition of the land in East Haven. . . ." *City of New Haven*, 496 F.2d at 454.

decisions in those cases necessarily cannot present any conflict with this case.[8]

Moreover, both *City of New Haven* and *Burbank-Glendale* are thin on analysis and sparsely reasoned, limiting their application beyond their own facts. Neither provides the kind of thoughtful analysis that should make this Court concerned over a possible conflict among the circuits. *City of New Haven*, though now more than 30 years old, has been *mentioned* by the Second Circuit only once since it was written, and never relied on by that court as controlling authority. It has been cited only sporadically by other courts.

Burbank-Glendale has received even less welcome. Courts have repeatedly declined to follow the decision, calling its review "cursory" and "unhelpful," *In re Commercial Airfield*, 752 A.2d 13, 16 (Vt. 2000), and its analysis "incomplete," *People ex rel. Birkett v. City of Chicago*, 769 N.E.2d 84, 94 (Ill. App. 2d Dist.), *aff'd in part, rev'd in part*, 779 N.E.2d 875 (Ill. 2002). The Court of Appeals of Texas found that *Burbank-Glendale* had nothing to do with local land control when the appellants in that case tried to argue otherwise: "No one disputes that federal laws preempt local regulation *within the boundaries of an airport*. We cannot find that the Ninth Circuit holds more."

---

[8] Petitioners also claim that the "decisions below" are in conflict with the position of the United States as expressed in an *amicus curiae* brief filed in the matter of *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). (Pet., 23-25). Like *City of New Haven* and *Burbank-Glendale*, *Vorhees* involved only the effort of a neighboring property owner to assert state law claims to control the airport's use of its own property. The case had nothing to do with an airport owner's attempt to take and control property he does not own through the application of federal preemption.

Dallas/Fort Worth International Airport Board v. City of Irving, 854 S.W.2d 161, 168 (Tex. App.), *vacated in part*, 868 S.W.2d 750 (Tex. 1993) (footnote omitted; emphasis added).

Finally, the United States District Court for the Northern District of Indiana offered this analysis of the shortcomings in the Ninth Circuit's decision:

> However, this Court declines to follow [*Burbank-Glendale*], partly because it is not controlling authority, but mostly because it is unpersuasive. The Ninth Circuit cited only two cases in support of its finding, and it misstated the holdings of those cases. As explained *supra*, *City of Burbank* and *Gianturco*[9] do not hold that the FAA preempts any regulation "that directly interferes with aircraft operations"; rather, they stand for the much narrower proposition that the FAA preempts regulation of aircraft noise. . . . In short, [*Burbank-Glendale*] is cursorily and poorly reasoned, and thus this Court joins others that have declined to follow it. *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F.Supp. 742, 751 (N.D. Ohio 1995) ("[*Burbank-Glendale's*] view of the scope of the Aviation Act is simply broader than that implied by any reasonable reading of the statute").

Hoagland v. Town of Clear Lake, 344 F.Supp.2d 1150, 1157-58 (N.D. Ind. 2004), *aff'd*, 415 F.3d 693 (7th Cir. 2005) (additional citations omitted).

---

[9] *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

In *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923), Chief Justice Taft noted that "[t]he jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party . . . another hearing." *Id.* at 163. In spite of the petitioners' dire predictions, this case actually presents nothing more than disgruntled litigants seeking yet another bite at the apple – in spite of their own affirmative waiver of the basis for the federal claim on which they now seek review, and in spite of the unsuitability of the record for review of the issues that they raise.

CONCLUSION

For the those reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL J. KRISCH
Counsel of Record
WESLEY W. HORTON
MICHAEL S. TAYLOR
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

MARK K. BRANSE
ERIC D. KNAPP
BRANSE, WILLIS & KNAPP, LLC
148 Eastern Boulevard
Glastonbury, CT 06033
(860) 659-3735

SC17280 TTD	: SUPREME COURT
JAMES VENTRES ET AL.	: STATE OF CONNECTICUT
V.	:
GOODSPEED AIRPORT, LLC, ET AL.	: IN HARTFORD
	: APRIL 14, 2005

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

FOR THE APPELLANTS:
JOHN BASHAW, ESQ.

FOR THE APPELLEES:
MARK K. BRANSE, ESQ.
JANET P. BROOKS, ASSISTANT ATTORNEY GENERAL
DAVID H. WRINN, ASSISTANT ATTORNEY GENERAL
MIKE DONNELLY, ESQ.

Joy E. Franklin
Court Monitor

* * *

[2] JUSTICE SULLIVAN: Good morning.

Counsel, how do you want to work this? This is two cases but it's really one case. Do you want to take them separately or you want to take them as one case, or how do you want to do it?

MR. BASHAW: Your Honor, with the Court's permission, what the parties would with to do is allocate an hour's worth of time to the appellant to deal with both cases at the same time since both cases arise out of the same facts, the same memorandum of law.

Specifically, the appellant is actually going to reserve, if the Court provides, 25 minutes of time for rebuttal, so after 35 minutes of argument by the appellants which would cover both cases, both appeals, the other parties will each argue 20 minutes each, however they've allocated among themselves, and then there will be time for rebuttal if that pleases the Court.

JUSTICE SULLIVAN: So you're saying we're going to handle them as one case.

MR. BASHAW: Yes, Your Honor.

JUSTICE SULLIVAN: You're going to take an hour and you're going to request 25 minutes for rebuttal. Okay.

MR. BASHAW: That's correct, Your Honor.

JUSTICE SULLIVAN: What about the appellees?

MS. BROOKS: Assistant Attorney General Janet Brooks from the Attorney General's Office.

Our request to have two assistant attorneys general [3] argue was approved, so the first appellee to argue will be Attorney Branse on behalf of the Wetlands Commission. Then the Attorney General's Office will use its 20 minutes.

Fifteen minutes I will argue and five minutes for Attorney Wrinn who will argue one issue, which is the

issue of personal liability of Mr. Mellon, to be followed by the 20 minutes for Attorney Donnelly.

JUSTICE SULLIVAN: Okay. But you're going to have to keep track of the five minutes, the twenty minutes and all that. Okay?

So you want to reserve 25 minutes, is what you're saying, from 60.

MR. BASHAW: Yes, Your Honor.

JUSTICE SULLIVAN: All right. Okay.

MR. BASHAW: May it please the Court, my name is John Bashaw. I'm here representing the appellants in these two appeals: *Goodspeed Airport LLC, Timothy Mellon*, and *Timothy Evans*.

The appeals that are before the Court today arise out of the same set of facts, the facts being the cutting of trees by Goodspeed Airport at the southern end of the runway operated by the Goodspeed Airport in East Haddam, Connecticut.

The cutting of those trees occurred from November 29, 2000, to December 6, 2000.

The Inland-Wetlands Commission brought an action against the "airport parties" is how I will collectively [4] refer to them here for matters of convenience, claiming that the cutting of those trees, since the trees were located in an inland-wetland, violated the Inland-Wetlands Act.

The Inland-Wetlands Commission also brought a cause of action against the East Haddam Land Trust and the Nature Conservancy because the trees were located on land that's owned by those entities.

They, then, filed cross-appeals against the Goodspeed Airport, essentially for claims in trespass, violation of CUTPA, violation of the Connecticut Environmental Protection Act.

A separate complaint was brought by the Connecticut DEP in three counts against the airport parties for the same cutting of the trees. Two of those counts were CEPA counts. The third count was withdrawn by the DEP prior to trial.

The facts in this case, Your Honors, concern the, again, the cutting of the trees in an area that is south of a runway that's operated by Goodspeed Airport in East Haddam, Connecticut.

The airport was established in 1964 and 1965 and, at that time, the area in which the trees were cut in 2000, which I will refer to herein for convenience as the "cut area", was also cut in the 1964-1965 time period. Aerial photographs provided at trial show that to be true.

The area of the cutting was actually larger than what occurred in the Year 2000, although the evidence did show that some trees still remained in the cut area in the 1964-[5] '65 time period.

Evidence at trial also showed that on a periodic basis, after 1964 and '65, the various owners and operators of the airport proceeded to do additional cutting and removal of trees, as they caused harm or danger to aircraft that would be landing at Goodspeed Airport.

The physical layout of the airport, which might be of assistance to the Court in considering these issues, is you have Goodspeed Airport.

Directly to the south of the airport is a tidal brook that forms a boundary between the Goodspeed Airport property and property that's owned by the East Haddam Land Trust.

It's approximately 630 feet from the end of the paved portion of the runway to where that tidal brook is located.

The –

JUSTICE NORCOTT: I can't remember; I read this a couple days ago. Is there a map in any of these appendix that show that?

MR. BASHAW: In some of the trial exhibits there might have been.

JUSTICE NORCOTT: But none in the appellate briefs?

MR. BASHAW: I don't know, Your Honor, if there, I don't know if one was submitted –

JUSTICE NORCOTT: Thank you.

MR. BASHAW: – but there was another 335 feet of length, which is land owned by the East Haddam Land Trust, and a very small strip of land owned by the Nature [6] Conservancy, and then you have Chapman Pond.

The full extent from the end of the paved portion of the runway to where Chapman Pond is located is a thousand feet. The cutting occurred within that area.

So, experts at the trial also testified and witnesses testified that on a regular basis the trees were cut, removed, and trimmed to make way for planes.

The testimony did not say that it was cut to the extent that it was cut in 1964 and '65, when, essentially, the whole area was cut.

That evidence consisted of review of aerial photographs, a review of the Connecticut Department of Transportation file where they actually had Polaroid photographs that they took when they did inspections of the airport that showed what the trees looked like at the end of the runway.

It also included the testimony of the owners and operators of the airport at the time, that said on a regular basis, again, they removed the trees.

The Goodspeed Airport bought the airport in July of 1999. Mr. Mellon is the single member of the LLC.

Mr. Evans is a private contractor who performed the cutting at the request of Goodspeed Airport. Those are the three defendants in this matter.

After the trees were removed in November and December of 2000, the Inland-Wetlands Commission issued a cease and desist order to the airport parties.

[7] That cease and desist order said, basically had the effect of being so broad as to prevent the airport from even cutting its own grass on its property without the permission of the Inland-Wetlands Commission.

It said that you cannot remove any vegetation on the wetlands. The airport and the cut area are both located in flood plains of the Connecticut River which are defined by the Inland-Wetlands Act as wetlands. So, its so broad it prohibits the airport from cutting its own grass, if you take it to that extent.

Well, obviously, the airport parties appealed that decision, as required by law or as permitted by law. A hearing began in January of 2001. It ended in February of 2001 after four members of the Inland-Wetlands Commission recused themselves from the matter, leaving no quorum, and then they closed the hearing.

At no time did the airport parties, were they able to provide any evidence to the Inland-Wetlands Commission and, so, as the Trial Court ruled in this matter, that cease and desist order still is in effect.

I'd like to discuss with the Court what I believe is the strongest argument here today for the airport parties and for any party, and that's the issue of federal pre-emption.

The issue of federal pre-emption is also dispositive of almost all the claims that are before the Court today with perhaps the exception of the argument over the [8] prescriptive easement.

It's the position of the airport parties that neither the Trial Court nor the appellees of this Case have applied the correct federal pre-emption standard.

Of course, federal pre-emption arises out of Article 6, Section 2 of the U.S. Constitution that says that the laws of the United States should be the supreme law of the land.

The two federal laws at issue in this case are Title 49, Section 40-103a of the Federal Aviation Act, which says very succinctly: The United States government has exclusive sovereignty of airspace of the United States; exclusive sovereignty.

The other federal law at issue in this case is Section 41-71(3)(b)(1) which is under the Airline Deregulation Act.

That statute provides that a state may not enact or enforce any law or regulation or other provision having the force and effect of law related to a price, a route, which is the issue that's relevant in this case, or service of any air carrier that may provide air transportation under this act.

So, therefore, the issue in this case, succinctly, is: Do these two federal laws, under the Federal Aviation Act and the Airline Deregulation Act, preempt and prohibit the State of Connecticut and the Inland-Wetlands Commission from enforcing the Inland-Wetlands Act against the airport [9] parties and punish them under CEPA for the removal of the trees?

JUSTICE SULLIVAN: Did anybody from the FAA tell you that you had to cut these trees down at this time?

MR. BASHAW: These particular trees?

There was a letter that was received from the DOT, which acts as the agent of the FAA in many matters, when they did an inspection in September, I believe it was, of 1999 where they indicated that there were trees located on the airport property that needed to be removed, and they identified a line of trees to the south that also needed to be removed.

It did not specifically identify the whole area in which the tree cutting occurred. It referred to a line of trees.

JUSTICE SULLIVAN: Were these trees in this particular area?

MR. BASHAW: A portion of the cut area was within the line of trees, yes.

JUSTICE SULLIVAN: Did you seek a permit from the local Inland-Wetlands Commission?

MR. BASHAW: No, Your Honor, we did not, and we did not –

JUSTICE SULLIVAN: So you can't say what they would have done, then, if you did.

MR. BASHAW: Pardon me, Your Honor?

JUSTICE SULLIVAN: You can't say what they would have [10] done if you had submitted a request for a permit.

MR. BASHAW: That's correct.

The Inland-Wetlands Commission may have approved the full cutting on the land, but, based upon the arguments that have been raised, that's highly doubtful, but, no, they did not seek a permit because, again, the position is it didn't have to because this is subject to federal – it's preempted, that the airport has a right, under the Federal Aviation Act and the regulations adopted pursuant thereto in advisory circulars, to maintain clear airspace.

JUSTICE SULLIVAN: When the DOT told you to cut these trees down, did they tell you they were acting for the FAA?

MR. BASHAW: No, I don't believe they specifically said they were acting for the FAA. I think it was assumed that that's how the FAA delegates its authority to the DOT.

JUSTICE SULLIVAN: Well, you said "on some occasions".

MR. BASHAW: I'm not familiar with all areas of FAA regulation in which the FAA may withhold some of its specific regulatory, authority and may not delegate to the states. That's what I meant; I just don't know.

Under the test for federal pre-emption, basically, there are three standards for federal pre-emption, or three separate tests.

One is federal pre-emption exists where the laws themselves explicitly provide for pre-emption.

Secondly, pre-emption exists where you can find from [11] congressional intent, where intent can be inferred where Congress legislates comprehensively, thus occupying the entire field of regulation.

And, last, pre-emption can exist where there is explicit and clear conflict between implementation of the state law and implementation of the federal law.

Its the position of the airport parties that all three forms of federal pre-emption exist in this case.

With respect to explicit pre-emption, I've already mentioned to the Court the two federal laws at issue in this case.

The FAA law, which says that the United States has exclusive sovereignty of the airspace, obviously begins with the premise of what is federal airspace, but that is the only area in which the federal government has exclusive sovereignty.

There are a number of federal cases that are cited in our brief that explain what is navigable airspace. It clearly is that airspace which exists above what are called the "approach slopes" or minimum altitudes that are established by the FAA for airplanes that approach an airport runway.

Those standards are set forth at Part 77 of 14(c) (f) (r).

Basically – again, this is put forth in detail in the briefs – but the approach slope for this particular runway at Goodspeed Airport has a height that begins at the front end [12] of the East Haddam Land Trust where the front portion of the trees were located at 21½ feet above the ground, and it slopes up gradually to a height of 38 feet at the end, so you can imagine a slope in which the planes are approaching the airport and they are coming down at an angle.

Anything above that glide slope clearly is within the navigable airspace, and the evidence in this case showed, and is presented in the briefs and in the record, that many of the trees that were cut were up to 72 feet tall, clearly above 35 feet tall. They clearly protruded into the glide slope.

Not all of the trees did and there were shrubs that were also removed, but that still is within the navigable airspace because what the courts also say, and it's also in the statute, that the navigable airspace also includes the airspace needed to insure safety in the take-off and landing of aircraft.

The FAA has adopted an advisory circular which recommends for all airports that they maintain what's

called a "clear runway protection zone". It's referred to as an RPZ.

The RPZ extends for a thousand feet beyond the end of the runway, which would cover the full extent of where this cutting occurred.

JUSTICE NORCOTT: Can I ask you just a pretty simplistic question?

MR. BASHAW: Sure.

[13] JUSTICE NORCOTT: How long has the airport been there?

MR. BASHAW: Since 1964 or 1965, Your Honor.

JUSTICE NORCOTT: And the trees have always been there.

MR. BASHAW: No, not quite, Your Honor, actually.

Before 1964 and '65, because of floods in the 1930's, this area was pasture land, so it really only grew up into forest land since the floods, if you will.

JUSTICE NORCOTT: And that date was what?

MR. BASHAW: I think the floods were in the '30s and then it was used as pasture land up until about the '60s, if you will, and then it started growing in with trees.

JUSTICE NORCOTT: So, as far as air safety's concerned, it's a recent problem.

MR. BASHAW: Well, it's been a problem ever since the airport's been there.

JUSTICE NORCOTT: The existence of the height of the trees, I mean.

MR. BASHAW: Yes, Your Honor, ever since the airport's been there.

With respect to explicit pre-emption, Your Honor, again, it's our position that navigable airspace is, despite claims by the appellees to the contrary, in this particular case, literally, above the blades of grass because, as testified by the only aviation expert who testified at trial, he explained why this RPZ was so important.

[14] It's an area where planes need to have some comfort that if they fail in take-off, that they can land without causing harm and damage.

So, it's, again, the position of the airport parties that the navigable airspace is, in this case, well above the heights of the shrubs. It's as close as the blades of grass in this particular area and for this particular case.

Enforcement of the Inland-Wetlands Act in this case, as agreed to by the Trial. Court and as argued by the appellees, what it would result in is having to go and get a permit from the Inland-Wetlands agency to remove any obstructions to navigation.

If those obstructions are not permitted to be removed, then they will grow into the RPZ, they will grow into the approach slope to the runway and, in fact, because the airport is located in a flood plain, if a tree were to grow in the middle of the runway, they cannot remove that tree under the theory that's proposed by the Trial Court and by the appellees. They have to get permission from a local entity who can use their discretion and say, No, that tree must stay, we're not giving you a permit.

That tree is in the navigable airspace. That is within the exclusive sovereignty of the United States. It's expressly pre-empted by the Federal Aviation Act, and, more to the point, it's expressly pre-empted by the Airline Deregulation Act. The Airline Deregulation Act explicitly says no state law may interfere with any route to an [15] airport.

Clearly, if you have a tree growing in the middle of a runway, or let's get more practical with this case. If these trees are not allowed to be removed and they will grow to such heights at the end of the runway that they will effectively prohibit the use of that runway, it will be too dangerous to use that runway.

The runways only 2100 feet to begin with right now. It's not a long runway, but as the trees grow in height, the ability of pilots to come into that airport and use the appropriate approach angle becomes less and less.

JUSTICE BORDEN: Was there any evidence that before this clear cutting took place, Mr. Bashaw, the airport's defendants asked to contact the owners of the property and/or the Department of Transportation and said, Look, we've got a problem of airport safety here. We've got to do some cutting.

MR. BASHAW: Other than, Your Honor, requesting that the DOT come out and do an inspection when they first operated the airport, which the DOT did –

JUSTICE BORDEN: But that was several years before.

MR. BASHAW: That was right after they acquired the airport, that's right. It was several years before they did the clear cutting.

JUSTICE BORDEN: Yes, I'm talking about before going on and just clear cutting someone else's property, even though it's adjoining the airport, was there any evidence [16] that they said, We've got a problem. Its your property. DOT is basically the surrogate for the FAA. We think we have to cut the trees because planes are at risk.

Did anything like that happen?

MR. BASHAW: There were discussions with the Land Trust and the Nature Conservancy but it dealt –

JUSTICE BORDEN: I'm talking about in the evidence in this case.

MR. BASHAW: Not in the evidence in this case, your Honor, because it was the position of the airport that they had a prescriptive right to go onto that property and remove the trees, which the Trial Court agreed that the airport did have a prescriptive right to remove the trees.

A difference of opinion, of course, is in the scope of that and the Trial Court claimed that the airport exceeded the scope, but the airport did have a prescriptive easement to go onto that property and remove certain trees, and, so, no, so, evidence in this case did not discuss that particular issue.

JUSTICE PALMER: Counsel, was it to remove certain trees or to top off certain trees, or both?

MR. BASHAW: Well, the Trial Court said that there was evidence that both had occurred, that there had been evidence of trimming of trees in the past and also felling of the trees at their base.

JUSTICE PALMER: Just refresh my – did the Trial Court conclude that the defendant had a prescriptive easement to [17] remove certain trees altogether?

MR. BASHAW: Yes. The Trial Court said that with respect to the prescriptive easement, the prescriptive easement covered the removal and/or topping of trees on a – basically, it is based on an as-needed basis and on a regular basis, cutting them at the base – there was evidence of that in the past – but what the Trial Court said triggers that requirement is either the DOT coming onto the property and saying, You need to remove those trees, or complaints from pilots as they're coming in, saying, Look, I almost hit that tree, or, I did. You know, my landing gear nicked those trees coming in.

When pilots complain or the DOT says you need to do something – this is the Trial Court's decision and we actually disagree with some of the scope, we think the scope is broader – but the Trial Court at least said, under those circumstances, you have the right to go out and remove the trees that are causing the problems.

That can be topping, if that's possible, or I could be felling them at their base which also was done in the past.

JUSTICE ZARELLA: What about a tree that is wholly under the approach slope that you've talked about?

MR. BASHAW: Well –

JUSTICE ZARELLA: What if the tree is a ten-foot tree –

MR. BASHAW: Yes.

[18] JUSTICE ZARELLA: – doesn't go into the airspace. Do you have a right, under the prescriptive easement, to remove that tree?

MR. BASHAW: Well, under the Trial Court's ruling?

The Trial Court's ruling I would have to honestly say unless for some reason that tree was uniquely positioned so that pilots are saying, You know, that thing is dangerous, it needs to be removed, even though it's beneath the glide slope, then I think under the Trial Court's ruling, that tree could be removed, but, generally speaking, I think the Trial Court's ruling, basically is, you know, as the DOT identifies it, and the DOT might identify that tree as being offending –

JUSTICE BORDEN: How many –

MR. BASHAW: – so it's possible that it could.

JUSTICE BORDEN: – is there one runway?

MR. BASHAW: Yes – well, technically, there is one paved length of runway. It, essentially, is two runways. In a sense, it's one runway for the south and one runway for the north. You see in the briefs it's referred to as Runway 32. There's a Number 32 painted on the end of that runway.

JUSTICE BORDEN: How wide is that?

MR. BASHAW: The runway I believe is about a hundred feet wide? I'm not quite sure. I may be off on that. I don't know exactly.

JUSTICE BORDEN: In round numbers, how wide is the plaintiffs' property?

[19] MR. BASHAW: The plaintiffs' property. The appellants' property? The airport's property?

JUSTICE BORDEN: No, the plain –

MR. BASHAW: – Land Trust?

JUSTICE BORDEN: – the Land Trust property.

MR. BASHAW: Well, the Land Trust property is actually – from the front end of their property where it borders the creek, which is the property line with the airport property, to where it borders the Nature Conservancy property, its about 300 feet wide, thereabouts.

JUSTICE BORDEN: And, as I understand it, your clients clear cut the entire 300-feet width.

MR. BASHAW: Oh, yes, yes, Your Honor, my clients removed all the woody vegetation, essentially, from the brook to that 300-foot extension and also three trees that were located on the Nature Conservancy property which is as you (unclear) to the pond.

JUSTICE BORDEN: Well, what I'm trying to get in my mind, because we don't have a map in front of us, is if you've got a runway a hundred feet wide and you've got planes coming in or going up, I want to know how wide that property is that was clear cut to get a sense of the need and the danger.

I mean, I can see, arguably, in a path roughly along the same line of the runway a hundred feet or maybe 120 feet, ten feet on either side – planes don't usually, kind of, land or take off on an angle – and I'm trying to get a [20] sense of how much on either side of that, say, 120-foot width the clear cutting was done.

MR. BASHAW: Well, it might be helpful, Your Donor, for me to just do one thing as a preface to that.

The federal Part 77 glide-slope regulations, what they basically provide is for a 200-foot area just south of the paved portion of the runway. That's 250 feet wide. That has to be cleared of all vegetation. That's called "primary surface".

Beginning at the end of that primary surface and now sloping upward at a 20 to 1 ratio is what's called the "glide slope".

That glide slope also expands at a 5 to 1 ratio, so it's widening ever so gradually as it's going up, so the Trial Court ruled that the cutting occurred within that prescribed area, that space.

Just to finish on the explicit pre-emption issue and following up on the Airline Deregulation Act, again, if the trees are allowed to grow in this area under the Inland-Wetlands Act or if the airport is going to be punished under CEPA for removing trees that are obstructions, that will necessarily cause planes to re-route.

They will either have to come in from the other section of the runway, which might not be the optimum conditions for air flight, or they might have to go to another airport, and under the Airline Deregulation Act, that is not prohibited, that's not allowed. [21] The case law that's cited in the brief under the Airline Deregulation Act says that the language in that act is very, the print effect is very, very broad, perhaps broader than under the Federal Aviation Act provision cited to the Court.

JUSTICE ZARELLA: On this approach slope that you're talking about, could the FAA order you to cut

down a tree that was, say, 200 feet tall, that obviously protruded into the airspace?

Could the FAA, through the DOT, order you to cut that down?

MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.

In fact, what Your Honor is actually getting to is a point that I'll jump to (unclear) the Trial Court's discussion of *Catchings versus Glendale* (phonetic), which basically said that these Part 77 regulations are advisory, they're not enforceable.

Now, it's true. On their face, the Part 77 regulations do not permit the FAA or the DOT to order the airport owner to remove that tree. However, what could happen is the Connecticut DOT issues an airport a license to operate under, again, authority from the FAA.

In order to have that license and to continue to use that license and have it renewed, you need to have clear [22] glide paths, so if you do not remove those trees or don't have the ability to remove those trees, you could lose your license, you won't be able to operate, and that issue is relevant under the Part 77 analysis.

I'll refer the Court in particular to what the case is called *Big Stone Broadcasting*. It's out of the District of South Dakota.

In that case, the issue was somebody wanted to build a tower, a radio broadcast tower, near an airport. The FCC needed to issue a license for it, but the FCC won't issue a

license unless they have a determination of no hazard to air travel from the FAA.

Well, the FAA looked at the issue, looked at the glide slopes in particular and said, We find that there's no hazard here. The State of South Dakota, however, came in and said under their own regulations, That is a hazard and we won't let you build that tower.

Well, the proponents of the tower claimed that the State decision was pre-empted and they discussed specifically the Part 77 regulations and how they're only advisory, but the Court in *Big Stone* said it doesn't matter because those particular regulations have utmost importance because in order for the FCC license to be issued, you needed that determination under Part 77.

Similarly, in this case, to have a license to operate and to continue to have that license to operate and not have it be at risk of being revoked, you need to maintain glide [23] slopes. You need to remove those trees if you have the property right to do so.

In this case, the Trial Court said we do have the property right under circumstances where a pilot might say, That tree's in the way and needs to be removed, so it's a very similar case.

The other point from *Big Stone* is the *Big Stone* court said, We don't necessarily subscribe to the view that the FAA doesn't have authority somewhere in federal courts to enforce their regulations under Part 77.

Court didn't discuss where that authority arose but they weren't buying it.

Now, *Catchings versus Glendale* also is not even a pre-emption case; *Big Stone* is. *Catchings versus Glendale* is a case dealing with negligence.

The issue there was: Was the airport negligent in not maintaining a clear glide slope?

The Court said since there's nothing that mandates them to do this, there's no duty, and, therefore, for negligence per se issues, we can't find that there's a cause of action. It wasn't even a pre-emption case.

Also – and this goes to the issue of implicit preemption – the test for implicit pre-emption which comes out of *Florida Lime Growers*, basically says if there is federal superintendence of a field, of an area, then any state regulation, any state action that is aimed at or is similar to, that has any impact on that federal superintendence, [24] must be pre-empted.

It doesn't matter whether that federal superintendence arises out of Part 77 regulations that are not enforceable or recommendations or advisory because, in particular, what you have to do for that test, and I urge the Court to do this, is you look, first, at the two statutes that we've already cited.

Then, you look at the Senate report and the House report that was issued when the Federal Aviation Act was adopted, and the language is cited in the brief.

In particular, Congress said when they adopted the Federal Aviation Act: Aviation is unique among transportation industries and its relation to the federal government. It is the only one whose operations are conducted almost wholly within federal jurisdiction and are subject to little or no regulation by the states or local authorities.

Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. (End of reading)

So, there's a statement by the Senate of how important it is to have national federal superintendence of the area, of maintaining air safety and protecting the clarity of navigable airspace.

The House also said that the purpose of the Federal Aviation Act is to give the FAA administrator full responsibility and authority for the advancement and [25] enforcement of safety regulations.

Add to that the Part 77 regulations which establish these glide slopes. Add to that the advisory circular which recommends clear runway protection zones, and then add to that, as well, the numerous federal court decisions that say that the regulation of the airspace by the FAA is pervasive.

One case in particular, again, just referring the Court, is *United States versus City of Berkeley*.

It's a 1990 decision and it basically says where local control over federal activity obstructs the achievement of a congressional objective, local regulation is pre-empted. Congressional objective such as enhanced air safety may not be thwarted by local fiat.

Again, the point here is the law, it cannot be much clearer, of the presence of federal superintendence of the area of air safety and maintaining clear approaches to airports and areas for –

JUSTICE BORDEN: Was there any evidence in the case of – there certainly wasn't any evidence, I take it,

that either the FAA or the DOT told your clients to cut these trees.

MR. BASHAW: Other than, again, Your Honor, than identifying back in '99 a line of trees that were obstructions, yes.

JUSTICE BORDEN: Yes. Was there any evidence that there had been pilot complaints about the trees?

MR. BASHAW: For the trees that existed at that time?

[26] There was testimony in the past about planes hitting trees but not specifically with respect to these particular trees. These trees were much taller than the trees in the past.

JUSTICE BORDEN: I guess to make it more narrow, was there any evidence that this clear cutting of the entire piece was done in response to pilot complaints?

MR. BASHAW: I don't believe that there was testimony to that effect.

JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that are simply pre-empted.

MR. BASHAW: That's correct, Your Honor.

That –

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone and you otherwise have the property right to remove those trees, than you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

[27] Now, you do need –

JUSTICE BORDEN: What if there were – instead of trees, what if someone had built – I mean, I know this is a land trust so it wasn't, but let's suppose it's not a land trust.

There's a building there, a house, but there are no complaints by pilots that the height of the house is impeding their take-offs or their landings.

Neither DOT nor FAA has said, We've got to do something about that house. The house is 20 or 30 feet high, whatever it is.

I take it your argument would be that because of federal pre-emption, your client could go out and bulldoze the house and he couldn't be –

MR. BASHAW: Actually, no, Your Honor.

JUSTICE BORDEN: No?

MR. BASHAW: I want to be clear.

If that was my client's house –

JUSTICE BORDEN: No, no, no, no, this is a house on someone else's –

MR. BASHAW: Okay. If this is somebody else's house?

JUSTICE BORDEN: – this is the house on that land.

MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this gives you the right to go onto somebody else's property, to go and cut down and remove their trees. There's a case, I think it was *City of Westchester*, – it's a Connecticut decision – that dealt with abrogation [28] easements.

I'm not making a claim that the regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, You still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal pre-emption, I'm not sure I understand its relation to the easement.

Your clients claimed a prescriptive easement. I mean, if –

MR. BASHAW: And the Trial Court so found, but, yes –

JUSTICE BORDEN: But that's challenged.

MR. BASHAW: That's correct.

JUSTICE BORDEN: I mean, it's not like they had a deed, you know, an easement by deed which said you have the right to do this.

MR. BASHAW: That's right.

[29] JUSTICE BORDEN: They went and they did it and the Trial Court agreed with them. The other side challenges that in their cross appeal –

MR. BASHAW: Correct.

JUSTICE BORDEN: – but I'm still trying to – that's a matter of state property law.

MR. BASHAW: I agree, Your Honor.

JUSTICE BORDEN: How does that affect, one way or the other, whether you're pre-empted?

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

JUSTICE BORDEN: Well, no, I'm trying to –

MR. BASHAW: Yes –

JUSTICE BORDEN: – I'm trying to under – you said to me, well, you couldn't just go bulldoze somebody's house – well, your time is up but I'll have to take a little bit of it – you couldn't go bulldoze somebody's house because in this case you had an easement to cut trees.

MR. BASHAW: Right.

JUSTICE BORDEN: But I don't understand how – I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are pre-empted, so even if this had happened in the 14th year instead of the – well, in the 16th year so you didn't have an [30] easement by prescription – your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption – the whole point of pre-emption is if I have the right to remove the trees.

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport when it has the property right to do so.

I do not claim –

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?

MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor –

JUSTICE BORDEN: Let's suppose that this had happened – let's suppose that the Trial Court had rejected your easement. They said, Yes, you did it but it wasn't continuous or it wasn't open and notorious. You failed in some proof of your prescriptive easement cause of action.

MR. BASHAW: Correct. But it –

JUSTICE BORDEN: So you didn't, the Trial Court [31] rejected your claim of an easement. Would you still have a pre-emption argument –

MR. BASHAW: Not with re –

JUSTICE BORDEN: – on the claim of the Inland-Wetlands Commission?

MR. BASHAW: Not with respect to the East Haddam Land Trust and the Nature Conservancy land.

I would, however, still have the right because, remember, the cease and desist order that was issued to the airport prohibits them from removing vegetation on their own land.

JUSTICE BORDEN: I'm –

MR. BASHAW: But, yes, Your Honor, the answer to your –

JUSTICE BORDEN: – let's put aside your own land. The other party's land –

MR. BASHAW: Yeah, I –

JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

[32] If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption.

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you – well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

MR. BASHAW: I think I'll just, since I'm over my time –

JUSTICE SULLIVAN: You've got 21 minutes left.

MR. BASHAW: Good. I'll go into my rebuttal time.

The other portion of pre-emption is conflict pre-emption. I guess I probably won't rehash. The same argument applies to that.

You cannot have exclusive sovereignty of the airspace and you cannot effect the routes of aircraft coming to an airport if, and in this case what will happen is the trees will grow into the glide slope or grow into the RPZ and may grow onto the airport's own land, and they're prohibited [33] from doing it 'cause it's in a wetland or because it's in an area of international importance.

JUSTICE ZARRELLA: But your exclusive sovereignty argument, that depends upon, according to what you just talked to Justice Borden about, that depends upon your having a property right. There's no airspace issue above other people's property unless you have a property interest in it.

MR. BASHAW: If you have the property right, if you have the right to go on – you can't have somebody else come in and then tell you you can't remove those trees, and that was the facts of this case because now I do have exclusive sovereignty.

There is exclusive sovereignty over that particular land. I own it. The airport owned, they owned the land. They have the property right to go in and do the activity.

We have a state and local agency stepping in, saying, No, no, no, no, sorry. We can now allow trees to grow to 70 feet tall in that area, obstructing planes, and the poor pilot who's in the air – on a dark night, this airport has no control tower – is coming in in bad weather, expects that

they're going to have a clear approach slope because every airport is supposed to do it the same way. There's to be national uniformity.

If because some local wetlands agency decides, Nope, we're not going to let you remove those trees in this circumstance, the poor guy or woman is going to hit the [34] tree, they're going to die.

That's why it's so important that there be some uniform standards involved in this, so if you have the right – and, as an overlay to that, courts say you need to have the property rights, you need to acquire the property rights.

JUSTICE PALMER: You couldn't run an airport like that under federal law, though. You couldn't continue to run an airport like that, so you'd have to shut down the airport.

MR. BASHAW: That's correct because –

JUSTICE PALMER: And –

MR. BASHAW: Many airports are funded by the federal government. They get grants; this airport does not.

In order to get those grants, you have to first show the federal government that you have all those property rights. They want to make sure that there aren't going to be problems with towers and trees and houses popping up at the end of a runway that they just spent millions of dollars to help you fund.

JUSTICE BORDEN: Well, then, how did you get the license to run the airport before the 16 years of prescriptive use ran?

MR. BASHAW: Well, when the –

JUSTICE BORDEN: You didn't have any –

MR. BASHAW: Well, there were no trees, Your Honor, back in 1964 and '65. When they constructed the airport, [35] they took all the trees down.

JUSTICE BORDEN: But, certainly, there were trees – the 16 years was from '83 to '99. Right?

MR. BASHAW: Yes.

JUSTICE BORDEN: So, certainly, there were trees in '88, '87, '86, '85.

MR. BASHAW: And, as a matter of course, Your Honor, the evidence does show that some of those trees exceeded this glide slope, and, on a regular basis, the DOT did in fact re-issue the license.

However, that doesn't –

JUSTICE BORDEN: But you didn't have any property right at that point. Your property right didn't ripen until '89.

MR. BASHAW: Well, by then, Your Honor, again, I'm not an expert on tree growth necessarily but, having the trees been cut in 1964 and '65, it's going to take them awhile to grow up until they're actually up into an approach slope, so I don't know how long that takes but there is a certain period of time.

JUSTICE BORDEN: Okay.

MR. BASHAW: I guess at this point, Your Honors, what I will do is reserve the rest of my time to deal with rebuttal to the claims of the appellees.

JUSTICE SULLIVAN: Okay. You have 17 minutes.

MR. BASHAW: For rebuttal. Thank you, Your Honor.

JUSTICE SULLIVAN: Okay. Now, you have 60 minutes [36] but I can't keep track of how you're going to divide it up. You'll have to keep track yourself. Okay?

MR. BRANSE: That's what we intend to do, Your Honor, yes. Thank you.

JUSTICE SULLIVAN: Okay.

MR. BRANSE: May it please the Court, my name is Attorney Mark Branse and I'm representing East Haddam in the Wetlands and Water Courses Commission and James Ventres, who are charged with the enforcement of the state's Inlands-Wetlands Act within the Town of East Haddam.

I will be addressing the alternative grounds for affirmance which is (unclear) the facts of this case do not even present an FAA pre-emption claim.

I will also be addressing the legal aspects of that, and Assistant Attorney General Brooks will also be addressing that.

I will speak for approximately 20 minutes. I'll be followed by Assistant Attorney General Brooks, then by Assistant Attorney General Wrinn, who, between them, will speak for approximately 20 minutes, and, then, finally, Attorney Michael Donnelly who represents the East Haddam Land Trust and also the Nature Conservancy which we're referring to as the Trusts.

Initially, I must start by correcting certain factual misstatements by opposing counsel.

Mr. Bashaw told you that the trees were cut in 1964 and 1965. The testimony in this record by the man who [37] created that airport and numerous other witnesses is that it never looked the way it does today in memory.

The oldest witness, Mr. Gelston, stated that he remembered it looking like that before 1936 when his father cleared hay in that area.

No one could recall this area, as the Trial Court described it, "denuded" the way it is today; no one, not one witness.

It's also been stated that the so-called "5010 report" – that's the DOT report, which is Trial Exhibit 9 and also Exhibit 30; it's at Appendix 68 of our brief – the claim is that it identified the tree line, so-called tree line for removal; that is false.

That report identified seven identified trees scattered across the airport property for removal.

Mr. Mellon asked for permission from the wetlands office to remove those seven scattered trees. The wetlands office determined that the removal of seven trees, like a tree from your backyard, was not a regulated activity and authorized the activity and it occurred.

There was no directive to remove the tree line. It is identified only as what's called a "limiting obstruction".

If Your Honors look at that same report, you will see that the limiting obstruction for Runway 16 is the East

Haddam swing bridge. Does that mean that Mr. Mellon was authorized to demolish the swing bridge?

[38] You will also see that the limiting obstruction for other runways is a hill. Does that mean that he was authorized to remove the hill?

The fact is that that is not what the 5010 report stated, and Your Honors have it before you to check it.

Mr. Bashaw's indicated that the cease and desist order was appealed; it was not appealed. There is a mandatory hearing within 10 days under 22a-44a of the General Statutes. That hearing, as he pointed out, was adjourned because the defendant here, the appellant, objected to the composition of the panel.

Be that as it may, the point is there was no appeal because there was no application. There was not even, under the *Cannatta* and *Wilkinson* cases, an application to the Commission to determine its jurisdiction.

If the claim was that the Commission had no jurisdiction, the property owner could have presented what it is they proposed to do, why they felt that it was a permitted activity, and, if dissatisfied, appealed, but that is not what occurred here at all.

Mr. Bashaw's also indicated that there was testimony about trees, about planes hitting the trees. I hope in his rebuttal you will ask him to tell you where in the testimony that is because it does not exist.

The only accident about which testimony was heard by the Trial Court was a 1991 accident in which a plane cleared the trees and crashed into Chapman pond.

[39] In a trial I asked the appellants' expert witness, Does that mean that Mr. Mellon was authorized to fill in the pond, since that is where the plane actually crashed? The answer from their expert, No, that would no [sic] so authorize it.

Lastly, Mr. Bashaw's told you that pilots expect these clear zones when they land at airports. That is also incorrect.

If the Court looks at the testimony of Warren Standard, who was the designated DOT inspector for this airport, at our Appendix 66, you will see that one of the reasons for the inspections is that the DOT notifies the FAA of observed obstructions, such as the swing bridge or a hill or a tree, and these are placed in notices to pilots, much like the charts that are published for ships at sea.

The problem is you can't put a buoy in the middle of the air the way you can in the water, so the DOT and FAA notify pilots, Be aware when you land at this airport; there's an obstruction and this is what the obstruction is.

So, it is simply not correct that all pilots expect all airports to be clear. In fact, at this airport, at the time that Mr. Mellon purchased it, it had an approach slope of seven to one, as displayed by Exhibit 212 which was the report (unclear) time and also in Exhibit 9.

In fact, through all the inspections between 1978 and 1999, a total of 14 inspections, in only three of them did this airport actually have the required 20 to 1 approach slope and, yet, its license was never revoked.

[40] I also want to comment on this idea of license revocation. What the Court is hearing is a most novel argument.

The argument is that state wetlands laws are pre-empted by state DOT airport licensing laws if they are predicated in some sense on DOT advisory guidelines.

Mr. Bashaw's conceded that the Part 77 surface, as he's describing, are advisory, that they are unenforceable and cannot be mandated, so what he's really saying is that the compulsory element arises from the DOT license and, yet, there is no citation for the proposition that one state regulatory scheme can pre-empt another state regulatory scheme.

I don't think Your Honors will find such a proposition supported by our case law.

The essential element of pre-emption is that the federal government has filled the field. The cases that are cited in their brief deal with, for example, *City of Burbank* where the City attempted to regulate noise.

All of their cases involve situations where some state or local law tried to regulate something that has been extensively regulated by the FAA.

In this case, the wetlands regulations of Connecticut and of East Haddam do not – the East Haddam Commission did not put these trees in, they did not make them grow.

The Commission does not purport to regulate anything about the routes of planes or anything about the operation [41] of an airport. It seeks only to regulate activities within wetlands.

Another statement I should address was that the cease and desist order told Mr. Mellon he couldn't mow his

lawn. He's been mowing his lawn ever since without any objection from us.

The cease and desist order, which the Court can actually view in the record – it is at Appendix page 29 – simply prohibits further regulated activities which have not in fact occurred.

Basically, the appellants here are conceding that the foundation of their pre-emption claim, this Part 77 regulation, is advisory and, yet, they can cite for no proposition, for no authority for the idea that advisory guidelines pre-empt state environmental laws.

When their expert was asked, Have you ever, in your 25 years as an FAA inspector, authorized or directed a violation of a state or local wetlands law, the answer was, and I quote, Oh, no, unquote.

The Mellon parties basically argue before this Court that they have the powers of the FAA without the procedural protections of the FAA.

In the *Flowers Mill* case (phonetic) at page 184, the case describes the process the FAA goes through before it determines what is a substantial obstruction, and it talks about soliciting comments from, and I quote, interested parties.

[42] There's a process, a legal process for determining whether an obstruction is substantial and the Mellon parties and their expert witness conceded that and they concede it in their brief. Yet, it was completely circumvented in this case, so we feel there is no pre-emption based on the facts of this case or based on analysis of the case law.

I would turn, next, to the case of *Avalon Bay*. Basically, their argument is that since this Court would not extend wetlands jurisdiction wherever a salamander may stroll across the countryside, that that holding means that you can turn a flood plain forest into a meadow, that you can flatten every living thing.

I put up a chart over here for the Court that shows this approach slope, and this is from the actual 5010 report, the 1990 DOT report – it's in the record – and you can see that it uses an example, a tree, as a possible obstruction and shows how it's to be dealt with, which is the displaced threshold. It's discussed in our brief.

I think what's important about this is to note that the trees and shrubs that were cut in this case were well below the approach slope. Some of them certainly did protrude into it, but, as the appellants have said in their brief, many did not. There were "innumerable shrubs", to use the wording of the Trial Court, that were below it and yet were cleared.

So, our position is that under the *Avalon Bay* case, this Court never intended that decision to justify this type [43] of activity. If that is unclear, this is certainly a golden opportunity to clarify it and we hope you will do so.

We also feel that Public Act 04209, which we've really briefed, is retroactive and does indicate that the Commission is allowed to regulate the clearing of vegetation.

I'd also point out to this Court something that may be confusing because there's only one memorandum of decision.

The Court did discuss eagles and other wildlife aspects of this property. They discussed it only in the context of the state's CEPA claim.

Relative to the wetlands action, the Trial Court's noted impact was the increase in velocity of storm waters flowing across this cleared property, the increased likelihood of erosion and sedimentation, and both Professor Patten and Mr. Gephardt testified extensively about those effects, so, in ruling on the wetlands action, the Trial Court referenced only physical issues and did not bring up the issue of wildlife until it reached a CEPA claim.

Lastly, I would like to address the issue of remedy.

Basically, our position here is that the Trial Court's decision rewards the shoot-first, ask-questions later mentality.

There are on the Connecticut River many homes that are well over a million dollars, in the millions of dollars. Their value is dependent, in part, on having a view of the [44] river. That view is often blocked by trees.

We have a case here where we have an airport where some planes can land there and some can't. There is no federal law that says there must be an airport for every so many square miles or per county. There is no federal law that says that every airport must be able to accommodate every plane. Some you can accommodate, some you can't, but presumably you can make more money if you can accommodate more planes or bigger planes.

What the Trial Court is saying is that you can cause $150,000 worth of damage, give or take some factor, and pay $17,500 to fix it.

The clear message there is don't apply for a permit, don't seek a declaratory ruling, don't get an order from the DOT or anybody else, just go cut it and you'll get a slap on the wrist.

You'll get a penalty for, certainly in this case and I think in many eases on riverfront properties, is pocket change and that is for remedial legislation which is what the Wetlands Act is; that is not appropriate.

We also feel that the Trial Court erred in stopping the calculation, stopping the calculation clock upon the issuance of the cease and desist order.

The cease and desist order was issued by statute. 22a-44a authorizes commissions to issue orders that say, Stop doing regulated activities, and the purpose of that is in the hopes that these matters can be resolved at the local [45] level, without resort to a court action.

By stopping the calculation of penalties when that order was issued, the message the Trial Court is sending is, Don't issue an order, just go to court.

If this Commission had not issued an order, if it had just brought suit, the penalties would be calculating today or certainly through the end of the trial.

So, the very procedure set up by statute to try to seek local resolution, the process that's set up to protect wetlands has been used to protect the violator, to say, Oh, he was ordered not to do a regulated activity; therefore, he could not do a restoration plan. That is wrong.

The appellants could have submitted a restoration plan any time they wanted; they didn't.

Even under their claims of (unclear) of interest, no later than June 11 of the Year 2001 – and we've included the minutes of that meeting in our appendix – Attorney Bashaw conceded that a quorum of the Commission existed that met his requirements for impartiality and that could hear an application that was actually filed and certainly could have heard a restoration plan.

So, in summary, we feel that there is no pre-emption at fact or at law. We feel that this Court's decision in *Avalon Bay* is not a bar to the Commission's jurisdiction, and we feel that the remedy in this case is so inadequate as to be an abuse of discretion and to undermine the entire purpose of this remedial legislation.

[46] With that, I will defer to my colleague, Assistant Attorney General Janet Brooks.

MS. BROOKS: May it please the Court, I am Assistant Attorney General Janet Brooks and I will spend 15 minutes dealing with all issues of Mellon's appeal of the commissioner's suit and all issues in the cross-appeal with the exception of the issue of personal liability of Mr. Mellon, which will be addressed in five minutes by my colleague, Attorney Wrinn.

I am sole counsel for the appellees who will addressing the CEPA issues in this matter and I will begin there.

There's a CEPA issue within the appeal of Mr. Mellon and that is that he believes Count 3, the only count on which the Court awarded relief, is actually not separate and distinct from Count 1 and is the exact same thing as Count 1 which the Trial Court ruled that no relief could be granted.

This happened at the end of trial – excuse me, not even at the end of trial – when the memorandum was issued. There had been no motion to dismiss or motion to strike and the wording, apparently, feels like a motion to strike from the way the Court ruled.

Count 1, as its captioned in the complaint, was a CEPA count based on the unreasonable conduct to the wetlands and water course.

Count 3, and this can be found in our appendix – Appendix A1 is Count 1; Appendix A6 is Count 3; the CEPA [47] count as to the unreasonable impairment or destruction of the forest – so there are two separate and distinct, at least two separate and distinct natural resources that were adversely impacted by the same conduct, by the clear cutting; that is, there was harm to the wetlands and water courses by the elimination of the 2.5 acres and there was a separate and distinct harm to the forest.

Mr. Mellon argues that it was all really a walking, talking wetlands matter and it should have, the Count 3 should have been subsumed into Count 1 and thereby having all the CEPA counts disappear in accordance with the Trial Court's reasoning, so for all the reasons that are set forth in my brief, the protection of the forest is separate and distinct.

Regardless of whether there was or wasn't an impact to the wetlands or water course, there would be a separate and distinct cause of action to protect the forest.

In the world of environmental protection, this is called "multi-media", that there are multi natural resources that are impacted. This is the bread and butter of what the

commissioner does all the days: evaluate the different impacts arising from the same conduct or same act.

The other aspect of CEPA that is implicated in this appeal is raised in our cross-appeal and that is that Count 1 was erroneously dismissed, if you will, if that's the word, that the Court did on its own in the memorandum of decision.

[48] The Trial Court began in its evaluation of Count 1 by noting that DEP had established, by a preponderance of the evidence, that there was impairment of the wetlands, and it said it was going onto the second step in the CEPA analysis, which is, is it unreasonable and it pointed to *Waterbury versus Washington* which is the appropriate standard to review unreasonableness.

Then, without making any conclusion as to the unreasonableness, using the *Waterbury versus Washington* standard, it moved to the *C Cam* decision (phonetic), and it immediately concluded that a claim or cause of action which notes that there is a failure to have received a license cannot be the basis for a CEPA claim and notes an eight-page swath in the *C Cam* decision.

The *C Cam* decision did find that there is no standing for the CEPA plaintiffs there to pursue their issues of administrative irregularity in the permitting process.

C Cam, the Court noted that there was no allegation of direct harm to the environment, that it was a company operating without a valid permit and without a valid emergency authorization, and there the *C Cam* court said that a claim of an invalidly issued permit does not directly threaten the public trust in the natural resources.

The *C Cam* court took great pains to leave standing as valid law the, commissioner's suits with CEPA counts in addition to claims of a failure to have an environmental permit.

[49] I would direct the Court to pages 140 and 141 where the *C Cam* court catalogued three cases which the commissioner brought a CEPA count in addition to a statutory cause of action; say, a failure to have a solid waste permit, failure to have a water discharge permit and the like.

It particularly said the focus in those cases brought by the commissioner was on the conduct, the polluting or impairing conduct.

Then, the *C Cam* court went and compared *Fish I* to *Fish II* and said *C Cam* is just like *Fish II*. In fact, there were more or less the same plaintiffs in *Fish I* and *C Camp* but *Fish I*, the *C Cam* court said, was an action for injunction for direct environmental harm, consequences of the operation of a cooler water system, but Count 2, just like *C Cam*, was based on administrative irregularities in the permitting process.

The DEP suit here is like *Fish I* for direct environmental consequences of the clear cutting of 2.5 acres of forest in wetlands of international significance.

I say that by going to the complaint itself and, yes, we did plead in Count 1 that there was a failure to have a permit, and why did we do that? Because *Waterbury versus Washington* instructs us that is the measure of unreasonableness.

So, it wasn't sufficient for me to plead that there was clear cutting of trees on the neighbor's property and [50] that that constituted an impairment of wetlands.

It was the clear cutting of trees on the neighbor's property without a permit which constituted unreasonable impairment, so, yes, we had to note that there wasn't a permit for it to succeed in the post-*Waterbury versus Washington* world.

I would also note that the commissioner's suit is not an action against the administrative agency, the East Haddam Wetlands Agency, saying, Why didn't you take some enforcement action? The commissioner seeks relief from the conduct which impaired the wetlands.

JUSTICE BORDEN: So, you're saying that when the Trial Court said that we decided in *C Cam*, I guess it was *Rogue versus C Cam* or *C Cam versus Rogue.*

MS. BROOKS: *C Cam versus Rogue.*

JUSTICE BORDEN: When we decided – the Trial Court was wrong in reading that case as saying lack of a permit itself can't be the basis for a CEPA claim. That's an improper reading of that case –

MS. BROOKS: That's right.

JUSTICE BORDEN: I'm just trying to get your argument – because *Waterbury versus Washington* says that when you're trying to define "unreasonable environmental conduct", you have to look at the statutory scheme that the legislature has set up governing that, and the licensing or the permitting before you do something defines the unreasonableness under *Waterbury.*

[51] MS. BROOKS: Precisely.

JUSTICE BORDEN: All right.

MS. BROOKS: So in that event, we would urge the Court, then, to reinstate Count 1.

There's no need for further action because the Court already found that we proved the impairment by a preponderance of the evidence, so what only would remain is whether it was unreasonable, and that is was the Wetlands Act violated?

The Trial Court made that finding in the joint action brought by, (sic) and the other action brought by the East Haddam Wetlands Commission found there was a wetlands violation.

The importance of reviving Count 1 is if, that's if the appellant, if Mr. Mellon loses on all of its appeal, the importance of winning on this count, reviving Count 1, is not so significant, but if Mr. Mellon persuades this Court that Count 3 is nothing other than Count 1, it really is a walking, talking wetlands violation, then it's of the essence for the commissioner that Count 1 is restored.

I'd like to address a few matters on the pre-emption argument that were not raised; that is, I believe Mr. Bashaw's argument is that field pre-emption, occupation of the field is when you put together all the different layers, you can't come to any other conclusion, then, that the Federal Aviation Law pre-empts or so pervades the field that there can be no conclusion that these environmental laws are [52] pre-empted, but I want to knock down, like bowling pins, some of these essential elements.

One is the runway protection zones.

First, we had Mr. Bashaw admit that once you are at, say, the glide slope, that the glide slope would kick in the ability, at best, to remove the trees or the vegetation above that, the obstruction above it, and he needed to craft an argument that would get to the vegetation below the glide slope. For that he relied on the existence of a circular from the FAA setting out a definition of runway protection zones.

In Mr. Bashaw's appendix at page A51, we'll see why that is not and does not have the effect of law.

The circular begins at A51 and at A52 it says these are recommendations. The use of the standard is mandatory if it's for airports that take federal money.

It's both a fact that it did not take federal money and Mr. Bashaw said this airport does not receive federal money; therefore, its only advisory, Number One.

Then we turn to the actual runway protection zone regulation or advisory comments in question at page A74 of Mr. Bashaw's appendix.

He said that the function of this RPZ is to enhance the protection of people and property. This is achieved through airport-owner control over the RPZ's, and I skip a sentence. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ. I [53] was reading from Section 212.

Going down to Section 212b where it says recommendations, it indicates where the owner of the airport does not have access to the land and does not own the property right to control the use of the land, the RPZ land use standards have recommendation status for that portion of the RPZ not controlled by the airport owner.

So, we've eliminated the RPZ's so we don't have any authority that Mr. Bashaw provides for the cutting below the slope zone.

Then we have the Trial Court and not only the *Catchings* case but also – the *Catchings* case that tells us that the Part 77 regulations which establish and identify obstructions are just a tool for evaluating where an obstruction exists.

In fact, this Court had an opportunity in answering a certified question from the Second Circuit, looking at an abrogation easement, to examine what happens – that's the *County of Westchester versus Greenwich* in the early '90s – to examine what happens when there are obstructions in the glide zone, and, in fact, this Court noted that the consequence of having a high obstruction is not in the height of the trees – there, there were also high trees – it's on the length of the runway, and the Court noted in that case that that runway was displaced, its threshold was displaced, reduced by over a thousand feet.

So, for all of those reasons, I don't believe there [54] is any pre-emption in this matter, and, at best, it would never have protected any environmental regulation below the glide path, even if the Court were to find federal pre-emption.

At this point, I will turn it over to Attorney David Wrinn.

MR. WRINN: May it please the Court, I am Assistant Attorney General David Wrinn. I also represent the Commissioner of Environmental protection in this matter.

I'm confining my remarks in haste to a single issue, and that is Mr. Mellon's personal liability.

The brief that the commissioner has filed has set forth in a great deal of detail the matter here, which is one of action and participation and not one of status or vicarious liability or derivative liability, marking in that way a major division between responsibility under background principles of tort and environmental remedies and the territory that belongs to the corporate forum and such concepts as piercing the corporate vail.

This case has nothing to do with matters of the misuse of the corporate forum and everything to do with what Mr. Mellon personally undertook under the facts of the case and as found by the Trial Court.

The Trial Court –

JUSTICE BORDEN: You're saying, Mr. Wrinn, that when we're in the environmental area, if the nominal acter [sic] is a corporation, we don't use the normal piercing the corporate [55] vail.

If the nominal acter [sic] is a corporation but, obviously, corporations can only act through their agents who are human beings, the normal rules of piercing the corporate vail for attaching personal liability to the agent of the corporation, those rules don't apply; we have a different set of rules.

Is that what you're saying?

MR. WRINN: That's correct and in the *BEC* case, which I argued to this Court four and a half years ago, that decision lays out with great care and particularity precisely that divide and how that works; that a

corporate officer is, and has always been under the law of this state, responsible for the torts in which he participates.

Also, he would be equally responsible for the environmental statutes that he violates.

In the *BEC* case we have the Connecticut Water Pollution Control Act. In this case we have CEPA as the statutory source of the violation.

In fact, we have a supplemental environmental statute which strives to protect the public, the public trust, and in that context our claim is that Mr. Mellon actively participated in the destruction, the clear cutting of two and a half acres of flood plain forest in an area that has, indeed, international significance.

Mr. Mellon testified that he took responsibility for whatever Mr. Evans cut: Whatever he cut was on my [56] instructions because I told him to cut.

Mr. Evans basically testified that he was told by Mr. Mellon to, quote, cut everything regardless of size or species. Again, when asked who directed Mr. Evans to cut these trees, Mr. Mellon responded, I did.

So, without doubt, this is a case that readily, easily falls into the category of corporate officer participating, along with the corporate entity, in the violation and in the acts complained of which would be the violation of CEPA.

By the way, it would also be a violation of the Wetlands Act for all the same reasons.

In summary, again, looking to the analysis in *BEC* which treats the special circumstance of a statute but also

the background circumstances of the common law as they (unclear) environmental protection remedial legislation to effect the sound policy of the protection of natural resources of this state, there is nothing in either statute that would preclude Mr. Mellon from being held liable on the same analysis that the *SEC*, court reviews in the process of having determined in that case Mr. Irvin Shiners' (phonetic) responsibility for the (unclear) that occurred in that case.

The only thing that the appellants can point to is a section of the Limited Liability Act, and that is 34-134 which is entitled Members and Managers as Parties to Action, but I would assert to you that that says no more than is the law in this state with respect to corporations of any [57] description, which is that you don't make an officer liable merely because of his status.

We haven't done that. We alleged that he involved himself in certain actions and the proof of trial more than corroborated this, proved it.

That section, 34-134, says that: A member or a manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company. (End of reading)

That just restates the same learning that can be found in the *Scribner versus O'Brien* case and *Kilduff versus Adams*, both of which cases, by the way, are discussed in the *BEC* analysis where those corporate officers were deemed responsible for having undertaken a responsible share in the actions that led to the violation of the statute, so it's no different here.

In summary, what this case is about is about participation; it's not about status.

Thank you.

MR. DONNELLY: May it please the Court, my name is Mike Donnelly. I represent the trust defendants in this case; that is, the East Haddam Land Trust and the Nature Conservancy.

By Way of background, these parties are non-profit landowners who own the property on which the cutting in question took place; that is, the two and a half acres to [58] the south of the runway.

They hold these properties in trust for future generations. These are not commercial properties. They are, in fact, held in as close to a natural state as is reasonably possible.

The trust parties believe that the Trial Court's decision should be upheld with respect to the pre-emption issue and with respect to the CEPA issue that you've just heard counsel for the Inland-Wetlands Commission and the DEP talk to. We adopt their positions and I will not be speaking on them.

I'm going to turn, instead, to the portions of the cross-appeal where the trust parties are seeking affirmative relief from this Court. There are three items that, time permitting, I would like to touch on.

The first is the question of the prescriptive easement. The second is the Trial Court's striking of the unfair-trade-practices claim, and the third is our request for a remand for a hearing in damages under Section 52-560.

Of these three items, by far the most important to the trust parties is the question of prescriptive easement.

I'm not, frankly, sure whether counsel for the Mellon parties was addressing the scope of the easement or whether he was arguing pre-emption in portions of his discussion, but I think it's important to correct at least the implication that was given with respect to what the Trial Court held as to the existence of an easement.

[59] I would like to read what is found at page 27 of the decision, which I believe is on page 61 of the final appendix that was filed recently by counsel for the Mellon parties.

The Trial Court found, quote, a prescriptive easement to go onto the two-and-a-half-acre area on occasion and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway, closed quote.

You have, I believe, heard counsel for the Mellon parties say that that would permit the airport to go onto the Land Trust property and cut a ten-foot tree or shrub if the airport could get one of its pilots to complain about that tree or shrub.

That is absolutely a guarantee of future litigation between these two parties.

The Land Trust and the Nature Conservancy hold property in trust. It is their duty to reinstate this flood plain forest for the purposes of protecting Chapmans Pond.

The Trial Court found a variety of impacts which result from the removal of the flood plain forest, scouring the like.

The airport you have heard indicate that it believes that as long as it has this complaint from a pilot, it can go and cut virtually anything on the property.

The Trial Court erred by granting this ill-defined easement.

JUSTICE BORDEN: Mr. Donnelly, was there any evidence [60] presented by the airport defendants that would have justified a more narrow and clearly-defined easement than the Trial Court granted?

I mean, they –

MR. DONNELLY: That's a complicated question, in my mind at least.

There was evidence presented that, almost on random occasions, the predecessor operators of the airport went in and cut or trimmed – it was not clear which – on occasion to take out certain limbs, sometimes certain trees at other times.

The evidence that was presented to the Trial Court is clear, though, with respect to contemporaneous documents from the DOT files that, from the period in 1978 through 1994, this 20 to 1 glide slope that we've talked about was virtually never in place. It ranged from 7 to 1 in 1978 – I'm sorry – 14 to 1 in 1978 to 7 to 1 in 1999.

JUSTICE BORDEN: Well, let me put it another way. Maybe this will answer my question.

I take it there were trial briefs in this case –

MR. DONNELLY: Correct.

JUSTICE BORDEN: – and one of the claims of the airport defendants was that they had proven a prescriptive easement.

MR. DONNELLY: Correct.

JUSTICE BORDEN: In their final brief to the Court, to the Trial Court, did they define the scope of their [61] claimed proven prescriptive easement with any more particularity than the Trial Court formulated?

MR. DONNELLY: My understanding of their claim has always been that the clear cutting was within the scope of their claimed easement.

JUSTICE BORDEN: So their claim was that they had an easement to go in and do what they did to begin with.

MR. DONNELLY: Correct.

I believe Mr. Mellon's test –

JUSTICE BORDEN: And the Trial Court didn't give them that but he gave them this kind of –

MR. DONNELLY: – ill defined.

JUSTICE BORDEN: – what you call "ill defined". All right. Thank you.

MR. DONNELLY: And, in fact, based on the ill-defined nature of the easement, I filed a motion for articulation, and the Trial Court's response to that was an acknowledgement that it could not articulate the easement any more clearly than it did under the circumstances of the case.

It is our view that this ill-defined easement is contrary to repeated findings and holdings of this Court which has repeatedly said that it is the duty of a party which is seeking to obtain an easement to define the boundaries with some particularity.

The boundaries that were talking about here are boundaries not only of length and width but, by virtue of [62] what we're talking about, they are boundaries of height of the trees.

I suppose that there is an alternate possibility but it was never really raised, which is cutting on a periodic basis to the ground, let them grow up and cut them down again ten years later, but there was neither any evidence of that nor was there any claim that that's where we're going.

What we were talking about is, essentially, a three-dimensional path and it has not been defined, and I submit that under the holdings of this Court, as a result, the determination of the Trial Court should be reversed; there is no need to remand on this issue.

In addition, the Trial Court also erred by finding an easement despite the fact that there was a boundary-line agreement between the predecessors of the two parties. The boundary-line agreement is part of the record.

The boundary-line agreement is what set – you heard Attorney Bashaw indicate that the boundary between these two parties was the middle of the creek. The boundary-line agreement is the document that set that boundary.

It was signed by both the predecessor to the Land Trust and the predecessor to the airport, and, according to the terms of the document, which, again, are within the

record, the airport gave up all rights essentially to do anything on the southern part of that boundary line.

In exchange, the predecessor to the Land Trust gave up its rights to do anything to the north of that boundary [63] line except to pass and re-pass along a road that's on the airport property.

JUSTICE BORDEN: Why is that inconsistent with – putting aside the lack of particularity, why is a boundary-line agreement necessarily inconsistent with a prescriptive easement?

It seems to me that, if anything, it could support it because one of the – oh, I guess your argument is if you know you've given up your rights to the property south of you, you can't be claiming that you're doing this cutting as of right (unclear).

MR. DONNELLY; I believe that that is true; that is my personal belief.

I don't know that that, frankly, is consistent with what this Court has held in the past. "As of right" is a little bit of a tricky issue, I think, to this Court at times.

What is more important with respect to the boundary-line agreement is Section 47-38 of the General Statutes.

That is a mechanism by which a party which has its property under attack, if you will – someone is seeking to obtain an easement over it – that party does not have to go to court, that party does not have to result to self-help.

Instead, under Section 47-38 it can give written notice to the other party that it maintains that it owns the property in question, and from there it has to serve this

notice on the other party and then file it on the land [64] records.

What we have here is a notice signed by both parties. It is not just served. It is, in fact, an agreement of the two parties, signed by each party, and it was filed on the land records.

In *Crandall v. Gould* this Court analyzed 47-38 and found that when it is in place, when the notice has been given, that this stops the running of the prescriptive time period for all time going forward.

In *Crandall v. Gould* what was actually in place was an injunction. It was not an agreement. It was an injunction but the Court found that the injunction satisfied the 47-38 requirements, the notice requirements under 47-38 and that it stopped the running.

The offending activity in that case began, again, shortly after the injunction was entered and ran for some 29 years after that, although I believe in my brief I say it was 19 years. That's a typographical error. It's 29 years afterwards, well beyond the 15 years, but the Court, this Court said that's not good enough. Under 47-38, it's over. You can't start a new prescriptive period. The Trial Court never even addressed the 47-38 issue.

JUSTICE BORDEN: Tell me again why – I mean, the typical 47-38 notice is Property Owner A files a notice on the land records, saying, I own this land – puts a boundary description – and that means that my neighbor who has been entering on this land, cutting down trees or digging up [65] whatever, from that day forward any prescriptive use by the neighbor stops.

Now, fit the boundary-line agreement into that for me, into that scenario.

MR. DONNELLY: Sure. You and I are neighbors and I'm cutting your trees and, instead of you writing –

JUSTICE BORDEN: Oh, I own here, you own there.

MR. DONNELLY : Right.

JUSTICE BORDEN: Whatever you think you can do, the land record says you can't do on my land.

MR. DONNELLY: And, not only that, we shake hands instead of the typical situation where you have a sheriff give the notice.

JUSTICE BORDEN: All right.

MR. DONNELLY: With respect to each of these issues, there are no issues of fact. There are merely questions of law and, as a result, again, we ask that this Court simply reverse the finding that there is a prescriptive easement and there is no need for any additional action with respect to the prescriptive easement.

We do, however, ask that this Court remand the Case with respect to the unfair-trade-practices claim.

Now, I'd like to point out –

JUSTICE SULLIVAN: With respect to what? I didn't hear you.

MR. DONNELLY: The unfair-trade-practices claim.

Now, the Trial Court's decision indicates incorrectly [66] that we waived our rights under the unfair-trade-practices claim 'cause we failed to brief it.

When the Court looks at the record in detail, it will see that we didn't brief it because the claim had already been stricken.

The rationale that the Trial Court gave for striking the claim was that these two parties are not consumers or competitors. They don't have a consumer or a competitive relationship.

However, this Court has never held that there is a requirement for a consumer or a competitive relationship but, rather, that allegations fit within the cigarette rule, and I think the most recent decision on that came out two days ago.

Here, set forth in our, I believe, original brief to this Court, we have set out the entirety of our unfair-trade-practices claim.

We believe that it does comply with the cigarette rule; that is, that the allegations are essentially a straightforward slap suit and, as a result, the actions of the airport in both cutting the trees and in filing litigation against the individual members of the Land Trust, as well as claims against the Land Trust itself, offends public policy, is immoral, oppressive, unethical and unscrupulous and it does substantial [sic] injure business persons in that the Land Trust and the Nature Conservancy are business people.

[67] It's a non-profit business but they are, in fact, in the business of maintaining property.

For this re –

JUSTICE BORDEN: So it's the slap suit allegation that forms the crux of your CUTPA claim.

MR. DONNELLY: Correct.

The other item for which we seek remand is for damages under Section 52-560 which is the tree-cutting statute.

Below, we had a licensed arborist who was going to testify with respect to the replacement value of the 300-or-so trees that were cut down on our property.

The Trial Court relied on a case called *Flint v. Lincoln* in order to keep us from presenting this evidence.

The decision in *Flint v. Lincoln* basically turns on – I should take a step back. 52-560 provides for treble damages for the reasonable value of trees that are taken out on another person's property.

Flint v. Lincoln, and a handful of lower court other than that, have held that the reasonable value of trees is calculated in one of a couple of ways but not for replacement value; that is, typically it's the cord wood value of the wood as firewood or as timber, or it is the value of the property before the cutting with the trees on it and after – essentially, an ornamental value.

With all due respect to the Flint Appellate Court, that does not fit these circumstances.

[68] The value of this property, as the Trial Court found, is as a buffer to Chapman Pond. It is held in the public trust for that purpose and, as a result, it has relatively little commercial value, as would any land trust

property; relatively low commercial value once the requisite easements are placed on it that give the tax-exempt status for the donation of property to land trusts.

As Attorney Branse said earlier, we are in age now where there are multi-million-dollar houses. It is absolutely the wrong message.

It is absolutely, in my view, inconsistent with the wording of 52-560 with respect to the reasonable value – with providing damages as to the reasonable value of the trees to allow someone to go onto a neighbor's property to improve their view or to improve the glide path to their runway, to allow them to take out the trees and then simply have to pay for firewood value for that property.

We are not looking – the other thing that the Trial Court focused on with respect to rejecting our presentation of this evidence, granting a motion in limine not allowing our arborist to testify, was the difficulty you would find in analyzing the replacement value: how to deal with healthy trees, how to deal with trees that are older, how to deal with the spacing of trees.

I submit, that that is a red herring because quite frankly, that type of analysis is exactly what trial courts do all the time with real estate appraisers.

[69] Real estate appraisers look at comparable properties and then adjust them upwards or downwards, depending on whether this house is in better condition, that neighborhood is a better neighborhood.

There is nothing inherently impossible about making the same kind of analysis with respect for the replacement value of trees, particularly in a circumstance like here where the value of the property is for the public trust. It is

to protect Chapmans Pond in this area of international significance.

With that, unless there any questions, I'll step down. Thank you, Your Honors.

JUSTICE SULLIVAN: Okay.

MR. BASHAW: Again, for the record, John Bashaw, representing the appellants. So many issues; so little time.

Let me touch – I think what I'll do is I'll work backwards if the Court will permit.

With respect to the 52-560 claim, which is the value of the timber that was cut, we obviously agree with the *Maldonado* decision and with the *Stanley* decision.

It is inherently difficult to value these trees. Half of the trees that were cut on this property were of a species known as Ilanthis Eltisima (phonetic) which all parties agree is an invasive spore and species that nobody wants on this property. How do you value what, essentially, is a junk tree?

[70] I guess all trees have value but for purposes –

JUSTICE BORDEN: Well, if that's the case then if it can't be valued, then presumably the plaintiff, with respect to those trees, would lose its proof, wouldn't persuade the Court that there was any value lost.

MR. BASHAW: Then –

JUSTICE BORDEN: Why shouldn't they be entitled to at least be able to prove the replacement value of trees that aren't junk trees?

MR. BASHAW: Well, I guess it's similar, Your Honor, to all sorts of types of expert testimony that is just inherently unreliable that's not permitted to be allowed in court.

For example, in this case they also said the val – what about the trees that are rotten? How do you value the trees – how do you put a value on a tree that has a rotten bowl inside the tree and the tree is dead? All right. And there is evidence.

If you look in the record, there is a report by Dave Edson – he's one of the forestry experts – he (unclear) find that a lot of the trees that were cut were rotten.

Well, they may have a value to a woodpecker but –

JUSTICE BORDEN; Well, but, I mean, I don't know of any general rule of – I mean, I know we have these cases that say, at least in tort cases generally that if you're looking at, if someone comes along and mistakenly chops down your tree in front of your house, that generally the value is the [71] value of your property with and without the tree, not how much would it cost to replace the hundred-year-old oak tree.

Do we do that because – is that the rule because you're never going to be able to prove it?

MR. BASHAW: According to my understanding of the cases that have been cited today, Your Honor, that is the decision (unclear).

It's inherent – I can only use the language of the (unclear) – it is inherently incapable of being determined, and so the Trial Court has set three different alternatives for establishing value, and they attemped [sic] to put

nobody on to testify to any of those other values, market value. They didn't put anybody on.

They wanted to come in and talk, have somebody come in and talk about replacement value, and their claim is, according to their brief anyway, it's because this is a different type of property.

Well, the Court's decisions in the past are not based upon the type of property on which the tree was cut; it's based upon the methodology. The methodology's just inherently impossible to apply.

Moving to the CUTPA claim, this is not a slap suit. Remember, it was the Inland-Wetlands Commission that sued the Land Trust. The airport parties didn't sue the Land Trust. They got brought in because they were the owners of the property, so this is not a slap suit.

We didn't file suit against the Land Trust and the [72] individual members in these cases. They were brought in by another party, and to then propose a theory of law that says because an individual has resources, economic resources to defend himself in a claim, that that somehow is unscrupulous, immoral, unethical?

The Court has never ruled that way, and despite the fact that there's no business relationship at all either, which is a prerequisite to CUTPA, So I think the Trial Court ruled correctly in striking their CUTPA claim.

With respect to the prescriptive easement, I think I just want to clarify a few items by Attorney Donnelly. If you will bear with me, I'll get the reference from the brief.

I think Attorney Donnelly said that the trees, I guess, all that was shown that they were cut on – oh, I think he used the words "random occasions".

Well, in page 26 through 28 of the airport parties' reply brief in this matter is set forth in detail the actual testimony that was provided to the Trial Court by the witnesses who were present while all this tree cutting activity occurred.

I don't need to recite it since my time is limited here, but I would refer the Court to those sections where those witnessses [sic] tell in detail how the trees were cut. They were cut by chain saw, openly, during the daytime. They were cut every four to five years on a more extensive basis and every year as pilots complained about [73] the trees.

With respect to the claim that there's no evidence about the height at which the trees were cut, again, attached as exhibits to the reply brief are actual color photographs taken from the DOT file that show, over time, a distinct notch, the U-shape, if you will, where the cutting had occurred, so that gives some representation to the Trial Court that, clearly, there is a difference in height between the two sides where no cutting occurred and where the cutting did occur.

That –

JUSTICE BORDEN: When you made your, final claim for prescriptive easement in the final briefs, I take it you had some presentation to the Trial Court of what you, wanted your prescriptive easement to be. What was it?

MR. BASHAW: Well, we recited – Your Honor, it is actually our position in this case that we should have

the right to cut the trees as they did because of the cutting that occurred in 1964 and '65.

Now, I think I stated clearly and correctly in my earlier presentation that a larger area was cut in the '64-'65 time period and some small trees were left in that area, so I do not disagree with the representation by Attorney Branse that the area never looked like it did in 2000. There may have been a few trees left in '64, '65, based upon review of aerial photographs by an expert by the name of David Edson, and his testimony is in the record, so [74] with that exception, with the presence of a few trees in that area, I believe that the airport had a larger right to cut the trees than what the Trial Court required.

However, in this case there was plenty of evidence to support the decision that the Trial Court reached. We think the scope was broader but we think there was evidence certainly to support what they reached.

JUSTICE BORDEN: Well, but what do you say to Mr. Donnelly's claim that generally our cases say that if you have a prescriptive easement, the person claiming it has to do it with reasonable specificity?

MR. BASHAW: Well –

JUSTICE BORDEN: Do you agree that that is the general standard?

MR. BASHAW: Well, I agree that that is the general standard and obviously the facts –

JUSTICE BORDEN: Well, what is at all specific –

MR. BASHAW: Well –

JUSTICE BORDEN: – about as necessary to what? To produce safety.

MR. BASHAW: Well, obviously, Your Honor, I mean –

JUSTICE BORDEN: It doesn't say where, doesn't say, you know –

MR. BASHAW: Well –

JUSTICE BORDEN: – from time to time?

MR. BASHAW: Well, actually –

JUSTICE BORDEN: It doesn't say where, when, how.

[75] MR. BASHAW; Well, actually, Your Honor, again, I'll reference you to the pages of the brief, of the reply brief I just did because the Court did say there was evidence of where it occurred.

It occurred in the area in which the cutting occurred, which is a fairly well-defined area, in December of 2000. It is well defined as to when it occurred.

It occurred every four to five years on a more extensive basis where they would go out and cut for two to three days and then every year on an occasional basis, as somebody would complain about a limb that got in the way or one tree that had popped up out of the canopy that needed to be cut down.

I don't think anybody could ask, somebody to say specifically, well, exactly how many trees did you remove each and every single time and exactly where on that 2.5 acre parcel?

That's impossible to discern other than them saying it was in, again, the photographs show where that cut area is. They clearly show where the cutting occurred. They show the relative height to what the trees were cut.

In fact, some of those photographs even provide written on them the glide slopes, so that will also give you some indication of the height of the trees.

JUSTICE BORDEN: What do you say to his argument about the boundary-line agreement?

MR. BASHAW: Well, first of all, the handshake, I [76] think he referred to the handshake agreement between the parties wasn't between my client and –

JUSTICE BORDEN: Well, it doesn't matter. Were talking about –

MR. BASHAW: But –

JUSTICE BORDEN: – we're talking about a boundary-line agreement which is recorded on the land records which everybody says, I give up my rights to your property, you give up my (sic) rights to my property.

MR. BASHAW: But for purpose –

JUSTICE BORDEN: Why doesn't that perform the function of the statutory notice?

MR. BASHAW: Because, as I understand it, Your Honor, for purposes of establishing that claim under 47-38, under Section 47-39 you actually have to serve that document on the party against whom you're saying, trying to defeat the prescriptive easement from running.

Filing it on the land records is not enough. You have to serve it as if you were serving a civil complaint; that's in 47-39. They didn't satisfy the prerequisites for establishing a cause of action under 47-38.

JUSTICE BORDEN: Even though it was signed.

MR. BASHAW: But it was signed by a prior party to the airport, and that's the reason, Your Honor, I believe –

JUSTICE BORDEN: Well, what difference does that make? I mean, there, the –

MR. BASHAW: Well, because you're trying to take a [77] right away from somebody, Your Honor, and that's why I believe there's a requirement for service.

JUSTICE BORDEN: Look, Mr. Bashaw, if A and, B own the adjoining properties at one point and they come to a boundary-line agreement and they sign it and they serve it – they each give a copy to a sheriff and he serves it on each other – and let's suppose, you know, it says, and this is under 47-38 – now your client comes along and buys the property from A and B. The fact that your client didn't sign it doesn't insulate your client from the effect of it.

MR. BASHAW: Well, I –

JUSTICE BORDEN: You take whatever rights or liabilities your predecessor in title takes. Are you saying that 46-38 has to be renewed every time there's a transfer of title?

MR. BASHAW: I believe, Your Honor, what the law requires, and I'm only reading what 47-39 requires,

that the person against whom you're trying to stop the running of an ongoing prescriptive easement, it has to be served on them.

JUSTICE BORDEN: Is that your only argument –

MR. BASHAW: No, it is not, Your Honor.

JUSTICE BORDEN: – for the invalidity of that?

MR. BASHAW: I also believe, I agree with the Trial Court's ruling that even if 47-38 applied, it only stops to cease whatever continuing prescriptive easement might be running at that particular point in time. It doesn't prohibit it from re-establishing itself at some point in [78] time.

The Trial Court said, and I agree, there is a distinction between *Crandall versus Gould*, which was a judicial, it was a permanent injunction that was issued against a property owner and the Court said, for that purpose, as a matter of public policy, we're not going to let somebody come in and violate a permanent injunction for the purpose of establishing a prescriptive easement.

JUSTICE BORDEN: So, then, it only stops it but it doesn't prevent it from starting up again?

MR. BASHAW: I agree, yes, Your Honor.

JUSTICE BORDEN: So, then, if they have two property owners and one property owner realizes that the other property owner is encroaching on his land, trying to get in a prescriptive easement, so he creates a document under 47-38, serves it on the other party, okay, records it on the land record, and the other party stops for 30, 60, 90 days, six months a year, and then starts up again.

The 47-38 document has no effect?

MR. BASHAW: I believe that's correct, Your Honor.

JUSTICE BORDEN: Okay. Not much of a protection, then,

MR. BASHAW: I believe that that's what the law requires, though, and that's what the courts have held.

I also want to make sure that I believe, and Attorney Donnelly was talking about the, he read right from the Trial Court's decision about what the prescriptive easement [79] provided, and I don't think he was claiming that I mischaracterized it 'cause I think I did characterize it correctly, which is the prescriptive easement exists and is triggered by complaints from pilots and by a determination by a DOT that trees need to be removed.

I believe that's what I said in my earlier arguments, and I just want to make sure that I did not misrepresent that fact.

With respect to the personal-liability issue addressed by Attorney Wrinn, this is a single-member LLC, of course, and Mr. Mellon is that single member, so, of course, he will be the one who speaks to a contractor to go do work.

He will be the one who signs the check on behalf of the LLC. That's unavoidable when you have a single-member LLC. I don't know what that gets him as far as the facts of this case.

JUSTICE BORDEN: What about the *BEC* case?

MR. BASHAW: Well, the problem with the *BEC* case, Your Honor, is that case was limited, first of all, explicitly by its own terms of the Water Pollution Control Act. Secondly, that was the Responsible Corporate Officer Doctrine that was established by the Court.

Now, in this case – in the Water Pollution Control Act, under the definition of "person", they specifically included officers, directors, a basis that gave the Court to set a responsible corporate officer policy.

The Inland-Wetlands Act, with respect to an action [80] under 22a-44b, which is the cause of the action brought by the inland-wetlands case (sic) in this case, it doesn't include reference to corporate officers, directors, etc., the same language used in the Water Pollution Control Act, and, importantly, Section 22a-44c of the Inland-Wetlands Act, which is for knowing violations of the act, it specifically does include officers and directors.

So, for some reason, the legislature made a decision that, with respect to an action under 22a-44b, we're not going to include officers and directors.

JUSTICE BORDEN: Well, if Mr. Mellon, instead of ordering these trees cut down, were driving an automobile –

MR. BASHAW: I'm sorry, Your Honor, was –

JUSTICE BORDEN: If Mr. Mellon, instead of ordering these trees cut down, had been driving an automobile owned by the LLC and injured somebody, or let's suppose if Mr. Mellon, instead of ordering these trees cut down, drove off the road and rampaged through the land trust property and knocked over trees and shrubs and damaged the ground, he would be not only the LLC by

vicarious liability, assuming he was in the business of it, he would be personally responsible for that tort.

MR. BASHAW: Sure. I don't disagree with that, Your Honor. You're –

JUSTICE BORDEN: Why should he not be personally responsible for this just because he was the LLC officer doing it?

[81] MR. BASHAW: Well, Your Honor, I responded to your question regarding *BEC*, so under the Responsible Corporate Officer Theory of Liability, I don't think it exists in this case.

What you're talking about are some of the other theories of law that are proposed by the –

JUSTICE BORDEN; But in *BEC* we said that's consistent with the fact that corporate officers are personally responsible for the torts that they commit.

MR. BASHAW: I don't disagree with that theory of law that if you commit your own tort, you're responsible for it, but my response to that, Your Honor, is to actually look at the actual complaints that were filed in this matter and, in particular, if you look at the inland-wetlands complaint – I'll use that as an example – in Paragraph 5 of their complaint they identify Timothy Mellon in this case as "the defendant, Timothy Mellon, as a member, manager and owner of Goodspeed."

They don't make any allegations that he's liable because he's assisted in a violation, he's cooperated in a violation or participated in a violation. He's named as a member, manager and owner of Goodspeed.

That is the only basis they name him in their complaint on it, and under Section 34-134 that's prohibited; you can't do that.

If you also look at the DEP's complaint and you look at how they name Mr. Mellon, they name Mr. Mellon a member, [82] manager and owner of Goodspeed Airport, LLC.

Now, at trial did they proceed to, then, establish evidence that he spoke to Mr. Evans and he wrote the check? Yes, single-member LLC. He'd be the only one to do it but they didn't plead it. That's our response to that.

JUSTICE BORDEN: Well, was there any claim that he couldn't be held liable because of the pleading?

MR. BASHAW: There was a – the airport parties moved at trial to have all personal liability stricken from the case, and the trial judge denied that reque...

Your Honor, my time is up. I thank the Court for listening to the arguments today, and I obviously refer the Court to many of the arguments that I was not able to make today are set forth in our briefs, and I ask the Court to review the briefs.

Thank you very much for your time.

JUSTICE SULLIVAN: Thank you, Counsel.

(The hearing is ended.)

SC17280 TTD

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL.

CERTIFICATION

I, Joy E. Franklin, do hereby certify that the foregoing pages are a true and accurate transcription of the tape in the above-entitled matter heard in the Supreme Court by Chief Justice William Sullivan, Justice David M. Borden, Justice Flemming L. Norcott, Jr., Justice Richard N. Palmer, and Justice Peter T. Zarella on April 14, 2005, in Hartford, Connecticut.

Dated this 18th day of December, 2005, in Hartford, Connecticut.

/s/ Joy E. Franklin
Joy E. Franklin
Court Monitor

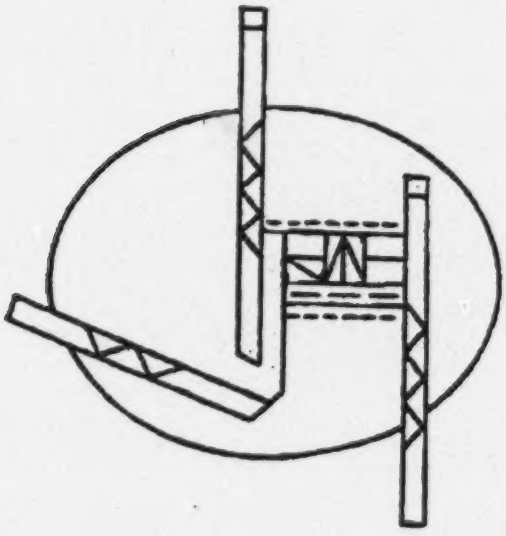
US Department of Transportation
Federal Aviation Administration

AIRPORT DESIGN

/INCORPORATES CHANGES 1 THRU 5/

AC: 150/5300-13
Date: 9/29/89

Advisory Circular



[LOGO]
U.S. Department
of Transportation

**Federal Aviation
Administration**

**Advisory
Circular**

Subject: AIRPORT DESIGN

Date: 9/29/89 **AC No:** 150/5300-13
Initiated by: AAS-110 **Change:**

---

1. ***PURPOSE.*** This advisory circular (AC) contains the Federal Aviation Administrations (FAA) standards and recommendations for airport design.

2. ***CANCELLATION.*** This (AC) cancels the following publications:

a. AC 150/5300-2D, Airport Design Standards – Site Requirements for Terminal Navigational Facilities, dated March 10, 1980.

b. AC 150/5300-4B, Utility Airports – Air Access to National Transportation, dated June 24, 1975.

c. AC 150/5300-12, Airport Design Standards – Transport Airports, dated February 28, 1983.

d. AC 150/5325-5C, Aircraft Data, dated June 29, 1987.

e. AC 150/5335-2, Airport Aprons, dated January 27, 1965.

3. ***APPLICATION.*** The standards and recommendations contained in this advisory circular are recommended by the Federal Aviation Administration for use in the

design of civil airports. For airport projects receiving Federal grant-in-aid assistance, the use of these standards is mandatory. At certificated airports, the standards and recommendations may be used to satisfy specific requirements of Federal Aviation Regulations (FAR) Part 139, Certification and Operations: Land Airports Serving Certain Air Carriers, Subpart D.

/s/ Leonard E. Mudd
Leonard E. Mudd, Director
Office of airport Safety and Standards

Chapter 2. AIRPORT GEOMETRY

200. ***INTRODUCTION.*** This chapter presents the airport geometric design standards and recommendations to ensure the safety, economy, efficiency, and longevity of an airport.

201. ***PRINCIPLES OF APPLICATION.***

a. *Need to Plan.* The significance of the interrelationship of the various airport features cannot be overemphasized. It is important that airport owners look to both the present and potential functions of the airport.

(1) Existing and planned airspace required for safe and efficient aircraft operations should be protected by acquisitions of a combination of zoning, easements, property interests, and other means. AC 150/5190-4, A Model Zoning Ordinance to Limit Height of Objects Around Airports, presents guidance for controlling the height of objects around airports.

(2) All other existing and planned airport elements, including the following, should be on airport property:

(a) Object free areas;

(b) Runway protection zones;

(c) Areas under the 14 CFR Part 77 Subpart C airport imaginary surfaces out to where the surfaces obtain a height of at least 35 feet (10 m) above the primary surface; and

(d) Areas, other than those which can be adequately controlled by zoning, easements, or other means to mitigate potential incompatible land uses.

b. *Airport Functions.* Coordination with the FAA and users of the airport should assist in determining the airport's immediate and long range functions which will best satisfy the needs of the community and traveling public. This involves determining the following:

(1) The operating characteristics, sizes, and weights of the airplanes expected at the airport;

(2) The airport reference code (ARC) resulting from (1);

(3) The most demanding meteorological conditions in which airplanes will operate;

(4) The volume and mix of operations;

(5) The possible constraints on navigable airspace; and

(6) The environmental and compatible land-use considerations associated with topography, residential development, schools, churches, hospitals, sites of public assembly, and the like.

c. *Airport Layout Plan.* When developing the airport layout plan, application of the standards and recommendations in this publication to the long range functions of the airport will establish the future airport geometry. See appendices 6 and 7 for detailed information on the development of the airport layout plan.

202. *RUNWAY LOCATION AND ORIENTATION.* Runway location and orientation are paramount to airport safety, efficiency, economics, and environmental impact. The weight and degree of concern given to each of the following factors depend, in part, on: the airport reference code; the meteorological conditions; the surrounding environment; topography; and the volume of air traffic expected at the airport.

a. *Wind.* Appendix 1 provides information on wind data analysis for airport planning and design. Such an analysis considers the wind velocity and direction as related to the existing and forecasted operations during visual and instrument meteorological conditions. It may also consider wind by time of day.

b. *Airspace Availability.* Existing and planned instrument approach procedures, missed approach procedures, departure procedures, control zones, special use airspace, restricted airspace, and traffic patterns influence airport layouts and locations. Contact the FAA for assistance on airspace matters.

c. *Environmental Factors.* In developing runways to be compatible with the airport environs, conduct environmental studies which consider the impact of existing and proposed land use and noise on nearby residents, air and water quality, wildlife, and historical/archeological features.

d. *Obstructions to Air Navigation.* An obstruction survey should identify those objects which may affect airplane operations. Approaches free of obstructions are desirable and encouraged, but as a minimum, locate and orient runways to ensure that the

* * *

(c) When the thresholds are staggered and the approach is to the far threshold, the minimum 2,500-foot (762 m) separation requires an increase of 100 feet (30 m) for every 500 feet (152 m) of threshold stagger.

209. *RUNWAY TO PARALLEL TAXIWAY AND TAXILANE SEPARATION.*

a. *Standards.* Tables 2-1 and 2-2 present the runway centerline to parallel taxiway/taxilane centerline separation standard. This distance is such to satisfy the requirement that no part of an aircraft (tail tip, wing tip) on taxiway/taxilane centerline is within the runway safety area or penetrates the obstacle free zone (OFZ). The computer program cited in appendix 11 may be used to determine the increase to these separation distances for elevation.

b. *Recommendations.* To have room for the acute-angled exit taxiway, provide a runway centerline to parallel taxiway centerline of at least 400 feet (120 m) for Airplane Design Groups I and II, 500 feet (150 m) for Airplane Design Group III, and 600 feet (180 m) for Airplane Design Groups IV, V, and VI.

210. *BUILDING RESTRICTION LINE (BRL).* A BRL should be placed on an airport layout plan for identifying suitable building area locations on airports. The BRL should encompass the runway protection zones, the

runway object free area, the runway visibility zone (see paragraph 503), NAVAID critical areas, areas required for terminal instrument procedures, and airport traffic control tower clear line of sight.

211. *OBJECT CLEARING CRITERIA.* Safe and efficient operations at an airport require that certain areas on and near the airport be clear of objects or restricted to objects with a certain function, composition, and/or height. The object clearing criteria subdivides the 14 CFR Part 77, Subpart C, airspace and the object free area (OFA) ground area by type of objects tolerated within each subdivision. Aircraft are controlled by the aircraft operating rules and not by this criteria.

a. *Standards.* Object clearance requirements are as follows:

(1) *Object Free Area (OFA).* Object free areas require clearing of objects as specified in paragraph 307, Runway Object Free Area, and paragraph 404, Taxiway and Taxilane Object Free Area (OFA).

(2) *Runway and Taxiway Safety Areas.* Runway and taxiway safety areas require clearing of objects, except for objects that need to be located in the runway or taxiway safety area because of their function. Objects higher than 3 inches (7.6 cm) above grade should be constructed on low impact resistant supports (frangible mounted structures) of the lowest practical height with the frangible point no higher than 3 inches (7.6 cm) above grade. Other objects, such as manholes, should be constructed at grade. In no case should their height exceed 3 inches (7.6 cm) above grade. Underground fuel storage facilities should not be located within runway and taxiway safety areas (see AC 150/5230-4), Aircraft Fuel Storage, Handling, and

Dispensing on Airports). Tables 3-1, 3-2, 3-3, and 4-1 specify runway and taxiway safety area standard dimensions.

(3) *Obstacle Free Zone (OFZ).* Obstacle Free Zones require clearing of object penetrations, except for frangible visual NAVAIDs that need to be located in the OFZ because of their function. Paragraph 306 specifies OFZ standard dimensions.

(4) *Threshold.* The threshold obstacle clearance surfaces, defined in Appendix 2, paragraph 5, require clearing of object penetrations.

(5) *NAVAIDs.* Certain areas require clearing for the establishment and operation of NAVAIDs. These NAVAID critical areas are depicted in chapter 6.

(6) *14 CFR Part 77 Obstructions to Air Navigation.* Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise. To determine otherwise, the FAA must find no substantial adverse effect as defined in Order 7400.2, Procedures for Handling Airspace Matters, Chapter 7, Evaluating Aeronautical Effect, Section 1, General. The FAA, normally, limits aeronautical studies of existing objects to obstructions to air navigation which are not included in the criteria cited in paragraphs 211a(1) through (5).

(7) *Runway Protection Zone (RPZ).* The RPZ requires clearing of incompatible objects and activities as specified in paragraphs 212a(1)(a) and 212a(2).

(8) *General.* Other objects which require clearing are those which generally can have an adverse effect on the airport. These include objects in the inner part of the

approach area (coinciding with the RPZ) such as fuel handling and storage facilities, smoke and dust generating activities, misleading lights, and those which may create glare or attract wildlife.

b. *Recommendations.* Other objects which are desirable to clear, if practicable, are objects which do not have a substantial adverse effect on the airport but, if removed, will enhance operations. These include objects in the controlled activity area and obstructions to air navigation which are not covered in paragraph 211.a, especially those penetrating an approach surface. On a paved runway, the approach surface starts 200 feet (61 m) beyond the area usable for takeoff or landing, whichever is more demanding. On an unpaved runway, the approach surface starts at the end of the area usable for takeoff or landing.

212. *RUNWAY PROTECTION ZONE (RPZ).* The RPZ's function is to enhance the protection of people and property on the ground. This is achieved through airport owner control over RPZs. Such control includes clearing RPZ areas (and maintaining them clear) of incompatible objects and activities. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ.

a. *Standards.*

(1) *RPZ Configuration/Location.* The RPZ is trapezoidal in shape and centered about the extended runway centerline. The controlled activity area and a portion of the Runway OFA are the two components of the RPZ (see figure 2-3). The RPZ dimension for a particular runway end is a function of the type of aircraft and approach visibility minimum associated with that runway end. Table 2-4 provides standard dimensions for RPZs.

Other than with a special application of declared distances, the RPZ begins 200 feet (60 m) beyond the end of the area usable for takeoff or landing. With a special application of declared distances, see Appendix 14, separate approach and departure RPZs are required for each runway end.

(a) *The Runway OFA.* Paragraph 307 contains the location, dimension, and clearing standards for the Runway OFA.

(b) *The Controlled Activity Area.* The controlled activity area is the portion of the RPZ beyond and to the sides of the Runway OFA.

(2) *Land Use.* In addition to the criteria specified in paragraph 211, the following land use criteria apply within the RPZ:

(a) While it is desirable to clear all objects from the RPZ, some uses are permitted, provided they do not attract wildlife, are outside of the Runway OFA, and do not interfere with navigational aids. Golf courses (but not club houses) and agricultural operations (other than forestry or livestock farms) are expressly permitted under this proviso. Automobile parking facilities, although discouraged, may be permitted, provided the parking facilities and any associated appurtenances, in addition to meeting all of the preceding conditions, are located outside of the object free area extension (as depicted in figure 2-3). Fuel storage facilities should not be located in the RPZ.

(b) Land uses prohibited from the RPZ are: residences and places of public assembly, (Churches, schools, hospitals, office buildings, shopping centers, and other uses with similar concentrations of persons typify

places of public assembly.) Fuel storage facilities should not be located in the RPZ.

b. *Recommendations.* Where it is determined to be impracticable for the airport owner to acquire and plan the land uses within the entire RPZ, the RPZ land use standards have recommendation status for that portion of the RPZ not controlled by the airport owner.

c. *FAA Studies of Objects and Activities in the Vicinity of Airports.* The FAA policy is to protect the public investment in the national airport system. To implement this policy, the FAA studies existing and proposed objects and activities, both off and on public-use airports, with respect to their effect upon the safe and efficient use of the airports and safety of persons and property on the ground. These objects need not be obstructions to air navigation, as defined in 14 CFR Part 77. As the result of a study, the FAA may issue an advisory recommendation in opposition to the presence of any off-airport object or activity in the vicinity of a public-use airport that conflicts with an airport planning or design standard or recommendation.

213. to 299. *RESERVED*

STATE OF CONNECTICUT
DEPARTMENT OF TRANSPORTATION

2800 BERLIN TURNPIKE, P.O. BOX 317546
NEWINGTON, CONNECTICUT 06131-7546

Phone: 860-594-2537

September 1, 1999

Mr. Timothy Mellon
P.O. Box 441
Lyme, CT 06371

Dear Mr. Mellon:

Subject: Goodspeed Airport and Seaplane Base
5010 Inspection

On August 11, 1999, I conducted the mandatory 5010 inspection of Goodspeed Airport and Seaplane Base. The airport's general appearance was good. The surrounding grass areas were mowed and the area was clean and well kept.

However, during the inspection, a number of items were noted that need attention to keep the airport in compliance with State regulations. Goodspeed Airport and Seaplane base is licensed as a commercial landing area, which is open for public use; therefore, it must meet the standards afforded to it. The following is a list of items that should be addressed.

Runway 14

- The primary surface area extends 200' from the end of the runway and ~~is~~ 250' wide (i.e. 125' each side of centerline). This area must be kept clear of all obstructions that are not fixed by function to a maximum height of 6"

at all times. As you are aware, it is important that the telephone pole fence be replaced with a frangible system.

- In the runway approach surfaces there are a number of obstructions with the most critical being some trees located 140 feet left of centerline at a distance of 440 feet from the runway end with a height of 56 feet above the runway surface. These trees should be removed as soon as possible since they are encroaching on the runway approach surface and penetrating the 7:1 Part 77 side slope. For further information, please refer to the enclosed plan sheet showing the airport layout illustrating the approximate location of the offending objects. Per FAA's Part 77, the minimum approach slope for this runway should be 20:1.

Runway 32

- The primary surface area extends 200' from the end of the runway and is 250' wide (i.e. 125' each side of centerline). This area must be kept clear of all obstructions that are not fixed by function to a maximum height of 6" at all times.

- In the runway approach surface there is a tree line that penetrates the Part 77 surface on the right side, center and left side. These trees should be removed as soon as possible to afford a much safer approach. These obstructions give Runway 23 an approximate slope of 7:1. For further information, please refer to the enclosed plan sheet showing the airport layout illustrating the approach

location of the offending objects. Per FAA's Part 77, the minimum approach slope for this runway should be 20:1.

I have enclosed the following information that I hope will be beneficial to you in understanding some of the guidelines that were used in doing the 5010 inspection and in evaluating the obstruction situation.

1. A drawing illustrating the 250' primary surface for utility runways with a visual approach at both ends that must be clear of all obstructions at all times.

2. A drawing illustrating the runway approach surface for a utility runway with a visual approach. This surface must also be kept clear of all obstructions.

3. A drawing which shows the methodology for measuring a 20:1 glide slope landing length which may be necessary if some of the obstructions are not removable.

4. Federal Aviation Administration Part 77, Objects Affecting Navigable Airspace, and number 77.25 Civil Airport Imaginary Surfaces.

5. A plan view of the airport which illustrates the approximate locations and heights of the obstructions.

6. Three sheets showing the measurements that were taken and the calculations that were done to establish the obstructions.

This office should be notified, in writing, within thirty (30) days to your receipt of this letter as to what action will be taken on the aforementioned items.

The State of Connecticut, Bureau of Aviation and Ports, is here to assist you in any way we can to keep this airport a viable part of the State's aviation system. We realize there are certain limitations in trying to operate this airport. If I can be of any additional assistance, please feel free to contact me.

Very truly yours,

/s/ Warren G. Stannard/ns
Warren G. Stannard
Trans. Supervising
Airport Engineer
Bureau of Aviation
and Ports

Enclosures

bcc: Kenneth J. Robert
Warren G. Stannard

(5)

No. 05-1088

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

In The

Supreme Court Of The United States

GOODSPEED AIRPORT, LLC, ET AL.
Petitioners

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER
OF ENVIRONMENTAL PROTECTION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

David H. Wrinn
Assistant Attorney General
Counsel of Record

Janet P. Brooks
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5250

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should the United States Supreme Court exercise its certiorari jurisdiction where the Petitioners raise an issue of federal preemption of state and local land use law which the Connecticut Supreme Court concluded it need not reach and thus did not rule on, because of a concession made by the petitioners at oral argument before that Court?

TABLE OF CONTENTS

Counter-statement of the Question Presented.....i

Table of Authorities iii

Counter-statement of the Case.....1

Summary of the Argument 4

Argument.....4

Conclusion 7

Appendix 1-A

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 520 U.S. 83, 117 S.Ct.1028, 137 L.Ed.2d 203 (1997).....5

Board of Directors of Rotary Int'l v. Rotary Club of Durante, 481 U.S. 537, 95 L.Ed.2d 474, 107 S.Ct. 1940 (1987).....5

Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317(1983).....4

McDonald v. Rowe, 43 Conn. App. 39, 682 A.2d 542 (1996).....6

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940).....4

Rocque v. Mellon, 275 Conn. 161, 881 A.2d 972 (2002).....1

Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 881 A.2d 937 (2005)..... 1, 2, 4, 5, 6

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981).....5

STATUTES

28 U.S.C. §1257.....4

28 U.S.C. § 1257(a).....4

Conn. Gen. Stat. § 22-16 1

COUNTER-STATEMENT OF THE CASE

The respondent, Connecticut Commissioner of Environmental Protection ("commissioner"), brought suit against the petitioners, Timothy Mellon, and Goodspeed Airport, LLC for the unreasonable destruction or impairment of wetlands, watercourses and the floodplain forest, pursuant to Conn. Gen. Stat. § 22a-16, for the petitioners' clear cutting of trees, bushes and woody vegetation on 2.5 acres of land adjacent to their airport, which land was owned by the East Haddam Land Trust and The Nature Conservancy ("the land trust parties").[1] *Rocque v. Mellon*, 275 Conn. 161, 163-65, 881 A.2d 972 (2005), Petitioners' Appendix B, 57a – 59a. This clear cutting was done by the petitioners without the permission of the land trust parties. *Mellon*, 275 Conn. at 165, Pet. App., 60a. The petitioners claimed that the trees posed a danger to aircraft landing at and taking off from the airport. *Id.*

The petitioners raised the special defense that the commissioner's action was preempted by federal aviation law. *Mellon*, 275 Conn. at 166, Pet. App., 60a. The trial court rejected the petitioners' preemption claim, entering judgment for the commissioner on his complaint as to the harm to the floodplain forest. *Id.*, Pet. App., 61a.

In the companion case, *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 881 A.2d 937 (2005), the

---

[1] The Connecticut Environmental Protection Act ("CEPA"), Conn. Gen. Stat. § 22a-16 *et seq.*, provides for declaratory, equitable and supplementary relief for the protection of the public trust in the air, water, and natural resources of the state from, inter alia, unreasonable destruction or impairment.

land trust parties cross-appealed the trial court's finding of a limited prescriptive easement on their properties running in favor of the petitioners. *Ventres*, 275 Conn. at 114, Pet. App. A, 7a. The trial court ruled that the petitioners had acquired a prescriptive easement "to go onto the 2.5 acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway." *Ventres*, 275 Conn. at 119, n. 19, Pet. App. A, 12a, n.19; *see also* Pet. App. C, 90a. The trial court further described this prescriptive easement as including "the periodic trimming and severing of a few or even several trees at a time." Pet. App. C, 91a.

The trial court concluded that the clear cutting exceeded the scope of the prescriptive easement and that the petitioners were liable to the land trust parties for trespass. *Id.* On appeal, the petitioners, however, did not challenge the trial court's determination that their clear cutting exceeded the scope of the prescriptive easement. *Ventres*, 275 Conn. at 131, 132, Pet. App. A, 25a, 27a. The Connecticut Supreme Court concluded "that the trial court properly determined that the airport defendants [petitioners] had no right under the prescriptive easement to clear-cut the land trust defendants' property." *Id.* at 119, Pet. App. A, 13a.

At oral argument before the Connecticut Supreme Court, the petitioners' counsel contended: "I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA [Federal Aviation Administration] regulations don't permit me to do it. The DOT [Connecticut Department of Transportation] can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it. If I do have the property right, which is the facts in this case as determined by the

Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland." Respondent's App., Transcript of the oral argument before the Connecticut Supreme Court on April 14, 2005, Resp. App., 8-A to 9-A.

In response to the petitioners' counsel's contention, Justice Borden replied: "Well, I understand your argument. It just seems to me a rather novel use of federal preemption. I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing. I thought pre-emption is pre-emption and it doesn't matter whether you—well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay." Resp. App., 9-A. Based on the questions of the Court and the answers of the petitioners' counsel thereto, Resp. App., 3-A to 9-A, the Connecticut Supreme Court held as follows: "At oral argument before this court, however, they [the petitioners] clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right." Pet. App. A, 11a.

Thus, based on state property law, the Connecticut Supreme Court concluded that "the trial court properly determined that the airport defendants had a prescriptive easement to maintain an approach slope over the land trust defendants' property, but that they exceeded the scope of the easement by clear-cutting the land. We further conclude that, because the airport defendants [the petitioners] had no right under state property law to clear-

cut the land, they had no such right under federal law and *accordingly, we need not reach their claim that federal law preempts state and local land use law.*" *Ventres*, 275 Conn. at 114-15, Pet. App., 8a. (Emphasis added.)

SUMMARY OF THE ARGUMENT

Because the Connecticut Supreme Court has not rendered a decision on the petitioners' claim of federal preemption based on the petitioners' concession made at oral argument before the Connecticut Supreme Court, there is no basis for the United States Supreme Court to review the petitioner's claim under its certiorari jurisdiction.

ARGUMENT

There is no ruling by the Connecticut Supreme Court on the petitioners' claim of federal preemption. *See Ventres*, 275 Conn. at 115, Pet. App. A, 8a ("[A]ccordingly we need not reach their [the petitioners'] claim that federal law preempts state and local land use law.") Pursuant to 28 U.S.C. § 1257 (a), the United States Supreme Court may exercise its certiorari authority to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had." In construing 28 U.S.C. § 1257, the Court has said "it is also the settled practice of this Court, in the exercise of its appellate jurisdiction that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Illinois v. Gates*, 462 U.S. 213, 218-20, 76 L.Ed.2d 527, 103 S. Ct. 2317 (1983), quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

The petitioners bear the heavy burden of demonstrating that the issue of federal preemption was

properly presented to the Connecticut Supreme Court. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here,' *Webb v. Webb*, 451 U.S. 493, 501, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981)." *Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997).

The petitioners cannot sustain that burden. The trial court ruled that the state civil actions against the petitioners were not preempted by federal aviation law. Pet. App. C, 71a – 74a. Thereafter, the petitioners appealed to the Connecticut Supreme Court claiming, *inter alia*, that the trial court improperly determined that federal aviation law does not preempt state and local wetlands law regulation. *Ventres*, 275 Conn. at 114, Pet. App. A, 7a. The Connecticut Supreme Court, however, had no need to reach the federal preemption issue based on the petitioners' concession at oral argument. Upon close questioning by that court, the petitioners conceded that federal law does not confer a legal right upon them to enter onto another's private property and clear cut his trees. Resp. App., 11-A to 14-A. The petitioners reinforced their concession at oral argument by stating that they would have had to secure that state property right in order to clear cut the trees. Resp. App., 12-A. Although the petitioners asserted to the Connecticut Supreme Court that the trial court had made a determination that the petitioners had a state prescriptive easement to clear cut the 2.5 acres of trees, the Connecticut Supreme Court disagreed, holding "that the trial court properly determined that the airport defendants [petitioners] had no right under the prescriptive easement to clear-cut

the land trust defendants' property." *Ventres*, 275 Conn. at 119, Pet. App. A, 13a.

The petitioners did not challenge the trial court's determination of the limits of their prescriptive easement, in order to preserve their claim that neither the state's inland wetlands laws nor CEPA applied to their conduct. *Id.* at 131, Pet. App. A, 25a. Thus, with nothing other than state law claims actually before it, the Connecticut Supreme Court rendered a decision on the petitioners' appeal without needing to reach the petitioners' federal preemption issue. *Id.* at 115, Pet. App. A., 8a. The petitioners themselves conceded that federal law did not grant them the right to enter onto another's property, and their discussion of conflicting legal authority and the reach of federal preemption under the regulatory scheme that they have described necessarily founders upon this point. Since the petitioners did not possess the state property law right to enter onto the land trust properties to clear cut 2.5 acres of forest, there was no need for the Connecticut Supreme Court to reach the preemption issue as the petitioners had framed it to that court – as it would not have changed the outcome of this case.

Thus, there is no Connecticut Supreme Court decision on the federal preemption issue that the petitioners wish to have the United States Supreme Court review. There is a lower state court ruling on federal preemption. In Connecticut, however, "(t)rial court cases do not establish binding precedent." *McDonald v. Rowe*, 43 Conn. App. 39, 43, 682 A.2d 542 (1996).

Absent a ruling from the Connecticut Supreme Court on the issue of federal preemption, this Court should decline to review the petitioner's claim under its certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RESPONDENT
GINA MCCARTHY,
COMMISSIONER OF THE
DEPARTMENT OF
ENVIRONMENTAL
PROTECTION

RICHARD BLUMENTHAL
ATTORNEY GENERAL

David H. Wrinn
Counsel of Record
Janet P. Brooks
Assistant Attorneys General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5250

March, 2006

No. 05-1088

In The

Supreme Court Of The United States

GOODSPEED AIRPORT, LLC, ET AL.
Petitioners

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER
OF ENVIRONMENTAL PROTECTION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

APPENDIX